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**A Civil-Law Prosecution System, Presidentialism and the
Politicisation of Criminal Justice in New Democracies:
South Korea and Russia in Comparative Perspective**

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Submitted in fulfillment of the requirement of the Degree of Doctor
of Philosophy (Politics)

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Abstract

This study aims to comparatively explore how the politicisation of criminal justice would appear in several new democracies with the institutional combination of presidentialism and a civil-law prosecution system, by focusing on the strategic interaction between an incumbent president and prosecutors, in South Korea and Russia, in the new institutionalist perspective.

Civil-law prosecutors could damage particular politicians' moral foundations with specific timing and extent, manipulating criminal proceedings through their broad power within the centralised criminal procedure. This is why they must be cautiously checked by any other body of government, contrary to their common-law counterparts who exercise a limited power due to the decentralised criminal procedure. Fortunately, in most civil-law countries, prosecutors are accountable to democratic bodies, in spite of the global tendency of judicial independence. Also in practice, civil-law prosecutors have not often been involved in the politicisation of criminal justice, despite their extensive influence over criminal procedure, in the continental European countries wherein the tradition of parliamentary supremacy is strong.

By contrast, in new democracies with the institutional combination between a civil-law prosecution system and presidentialism, prosecutors have often taken partisan behaviour in favour of or against an incumbent president. For instance, two South Korean Presidents, Young-sam Kim and Dae-jung Kim, and Russian President Boris Yel'tsin, had exploited civil-law prosecutors for the politicisation of criminal justice, but were faced with their defection immediately before their retirement. Unusually, only Vladimir Putin could avoid this unfortunate fate, even at the last phase of his tenure, among the South Korean and Russian Presidents after democratisation. According to this study, high-ranking prosecutors generally pursued their own career advancement, and consequently the prosecution service was loyal to an incumbent president during most of his tenure, but betray him in his last phase, during South Korean President Young-sam Kim's and Dae-jung Kim's periods, and in Russian President Yel'tsin's period. Only in the Russian President Putin period in the two countries after democratisation, prosecutors unusually continued to serve the president even when he left the presidency. This could be because they had no incentive to betray the outgoing president in order to further their career development under the next presidency, given that Putin would undoubtedly maintain a strong political influence over their careers, even after his retirement, according to this research.

On the other hand, South Korean President Moo-hyun Roh frequently came into conflict with prosecutors, and had his close allies investigated or even indicted by them, during his entire period, while repeatedly attempting major reform against the civil-law prosecution service, which President Young-sam Kim and Dae-jung Kim had abandoned, in order to maintain the alliance with the power apparatus. According to this study, prosecutors made

their organisational resistance based on their far-reaching power over criminal procedure, against President Moo-hyun Roh, for protecting their great prerogative, and therefore he failed in the reform. By contrast, Russian President Putin was exceptionally successful in large-scale reform against civil-law prosecutors, which not only President Yel'tsin but Putin himself in his first term had also suspended, by establishing the new 'investigative committee' in June 2007. According to this research, this outcome was possible because the prosecutors could no longer enjoy the political opportunity structure enabling them to effectively defeat the president's reform against their collective interests, and consequently President Putin could circumvent their organisational resistance, in the absence of political competition under his electoral authoritarian regime.

This study provides three important academic implications. Firstly, under the institutional combination of presidentialism and a civil-law prosecution system, prosecutors are not likely to preserve political neutrality, but to display a partisan behaviour either in favour of or against an incumbent government. That is, the institutional factor of combination of a civil-law prosecution system and presidentialism tends to induce the prosecution service, as a judicial body, to behave differently from the expectations of both the democrats and the liberals. Secondly, the variation of political competition can seldom influence judicial officers, who are responsible to the other branches of government, to behave independently of politicians, but can influence them, especially the top rankers, to betray an incumbent government in the last phase of its tenure on specific institutional and political conditions. Thirdly, and most importantly, the variation of political competition can influence judicial officers to take collective action for protecting their collective interests. In particular, if the judicial officers could exercise far-reaching power over criminal procedure, as civil-law prosecutors, their organisational resistance against an incumbent government which pushes for reform encroaching on their collective interests, such as prerogative powers, would be threatening enough to make the incumbent abandon the reform plan.

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Author's declaration

I declare that, except where explicit reference is made to the contribution of others, this thesis is my own work and has not been submitted to any other degree at the University of Glasgow or any other institutions.

Signature: _____

Printed name: Sun Woo Lee

Abbreviations

BAI: The Board of Audit and Inspection of Korea

CID: The Central Investigative Department of Supreme Prosecutor's Office (South Korea)

CPD: The Congress of People's Deputies (Russia)

CPSU: The Communist Party of Soviet Union

DJ: Dae-jung Kim

DJP: Democratic Justice Party

DLP: Democratic Liberal Party

DP: Democratic Party

FCS: The Federal Customs Service (Russia)

FSB: The Federal Security Service (Russia)

FSK: The Federal Counterintelligence Service (Russia)

FSKN: The Federal Narcotics Control Service (Russia)

GNP: Grand National Party

GPU: The State-Legal Administration (Russia)

HC: Hoi-chang Lee

IMF: International Monetary Fund

JP: Jong-pil Kim

KBS: The Korea Broadcasting System

KICAC: The Korea Independent Commission against Corruption

KPRF: The Communist Party of the Russian Federation

LDPR: The Liberal Democratic Party of Russia

MDP: Millennium Democratic Party

MH: Moo-hyun Roh

MVD: The Ministry of Internal Affairs (Russia)

NCNP: The National Congress for New Politics

NDRP: The New Democratic Republican Party

NHRC: The National Human Rights Commission (South Korea)

NIS: The National Intelligence Service (South Korea)

NKP: New Korea Party

OOP: Our Open Party

OVR: The Fatherland-all Russia

RDP: The Reunification Democratic Party

RSFSR: The Russian Soviet Federated Socialist Republic

RUIE: The Russian Union of Industrialists and Entrepreneurs

SPO: The Supreme Prosecutor's Office (South Korea)

SPS: The Union of Right Forces

ULD: United Liberal Democrats

USSR: The Union of Soviet Socialist Republics

YS: Young-sam Kim

Chapter I: Introduction

1. 1. Puzzle

This study attempts to comparatively explore how the politicisation of criminal justice would appear in several new democracies with the institutional combination of a civil-law prosecution system and presidentialism, by focusing on the strategic interaction between an incumbent president and prosecutors, in South Korea and Russia, within a framework of new institutionalists. As Nobel Peace Prize winner, former South Korean President Dae-jung Kim (DJ) argued in his autobiography, “Currently the worst cancer on South Korean society is nothing but the prosecution service” (Kim 2011: 565). Nonetheless, he also often sought to exploit this apparatus during his tenure. In addition, another former South Korean President, Moo-hyun Roh (MH) killed himself at the height of the prosecutors’ criminal investigation against him after his retirement. On the other hand, according to an analysis in *Novaya Gazeta* (26 April 2007), in Russia, the prosecution service had served as the most effective political weapon for the Kremlin to destroy any opposition, until its reform in 2007. In many new democracies, including these two countries, the enormous power of the prosecution service *per se* has received much attention, while the relation between a president and prosecutors has also thrown up some critical questions on the rule of law as one of the essential prerequisites for the consolidation of democracy.

As is well known, a number of countries are still within a ‘gray zone,’ not reaching the stage of fully-fledged democracy, in spite of different degrees among them, after the Third Wave of democratisation (Bunce 2000; Diamond 2002; Huntington 1991). This study defines new democracies as the countries within the ‘gray zone,’ and among them, some came close to a consolidated democracy but others went back to a semi-authoritarian regime. Then, the failure of the rule of law has been pointed out as one of the main obstacles to democratic consolidation (Carothers 1998; Linz and Stepan 1996; O’Donnell 2004). In fact, as with democracy, the rule of law also seems obviously to be a complex and multifaceted concept. Also considering its relationship with democracy, the definition

becomes more difficult. More importantly, as there is an essential tension between the rule of law and democracy (Bellamy and Parau 2013; Habermas 2001; Sejersted 1988), the judicialisation of politics or the politicisation of justice could not completely be avoided. It could be only regulated within a balance between democracy and the rule of law. But if institutional interactions between electoral branches and judicial bodies are inappropriately arranged, a balance between the two values can be seriously broken, which may intensify the danger of the judicialisation of politics.¹ For example, on the one hand, the rule of law may sometimes encroach on democracy in the name of judicial supremacy, not only in old democratic countries, but also in emerging ones. On the other hand, democracy can often damage the rule of law, owing to the judiciary which is still improperly subordinate to an incumbent government, in a number of new democracies. As a result, neither democracy nor the rule of law could actually be accomplished.

In particular, both in old and new democracies, since judicial officers recently obtained more independence from the other branches of government but accepted less democratic accountability than ever, they have increasingly brought perilous judicial activism in the form of political weaponisation, under the guise of the rule of law, as democrats worry. Then, more and more individuals and groups have attempted to misuse the judges or prosecutors, in order to stigmatise their political opponents as criminal suspects, which could distort democratic processes. Even the result of national elections may be reversed via namely the politicisation of criminal justice. Most of all, civil-law judicial officers, especially prosecutors, could be metamorphosed into a powerful political instrument, because they possess broader jurisdiction over criminal procedure than common-law ones (Di Federico 1998; Maravall 2003).² In other words, even the *ex ante* uncertain political

¹ According to Popova (2012: 40), the judicialisation of politics is the frequent trend toward the intervention of judicial officers in the thin and thick political life in mature democracies, whereas the politicisation of justice occurs when judicial officers produce decisions in favour of incumbent politicians in fragile democracies. However, this division looks not so proper, but two concepts can be two sides of the same coin (Santos 2002: 330-331). Although the judicialisation of politics *per se* can undermine democracy because political or social forces have increasingly been induced to make an alliance with the judiciary rather than to mobilise mass support (Crenson and Ginsberg 2004; Ginsberg and Shefter 2002), it is really dangerous when judicial officers may take partisan behaviours and distort democratic processes for their own political goals, while making a decision on political issues independently from elected politicians, in the developed democratic countries. Also in the new democracies, judicial officers would not necessarily be politicised to serve the interests of majority incumbents, but sometimes in favour of those of minority oppositions. Thus, the two concepts are not distinguished in the way that judicial officers can be politically used to distort democratic processes via judicial reviews or criminal proceedings. In addition, the politicisation of justice can encourage the judicialisation of politics, and the latter can reinforce the former in a vicious cycle (Stone Sweet 2000: 194-196). Therefore, these two terms will be used almost synonymously, and the politicisation of criminal justice will be termed to mean when a political faction strategically uses criminal proceedings to damage its political oppositions or enemies.

² As discussed elaborately in Chapter II, civil-law prosecutors hold both the powers to control investigations

contests chosen, as a prerequisite of democracy, by the minimalist Przeworski (1999) can be seriously undermined, if civil-law judges or prosecutors are no longer democratically required to take accountability. Correspondingly, the quarrel over civil-law prosecutors' partisan behaviour has seldom arisen, while they are accountable to electoral branches, in the continental European democracies.

However, in several new democracies, civil-law prosecutors are perilously involved in the judicialisation of politics via criminal proceedings, as they are accountable to an incumbent government. Considering the liberals' prediction, this is in fact not so surprising. In a fair number of countries, where not only a civil-law prosecution system was inherited from the past undemocratic regimes, but presidentialism was also introduced instead of a consensus form of government along with democratisation, prosecutors have worked as a political weapon in favour of an incumbent president. Also in South Korea and Russia, the prosecution service following a civil-law tradition has often been misused as the most effective instrument enabling incumbent presidents to distort democratic processes, while superficially claiming to advocate the rule of law. The presidents could not only stigmatise their political opponents as criminal suspects to undermine or even exclude them from various political contests, including national elections, but also give immunity to their own faction members involved in corruption scandals, relying on the civil-law prosecutors (Han 2000; Holmes 1999; Juang 2010: 212; Taylor 2011).

However, a more notable point is that most presidents and their close allies have also sometimes been investigated or indicted by civil-law prosecutors, although the latter is accountable to the former, in the last phase of their tenure in the new democracies. If the prosecutors had gone against them in the situation of a divided government, this could not be regarded as upsetting the balance between the rule of law and democracy. Then, it is difficult to say that the prosecutors seriously undermined the rule of law in the context of democracy, even though they might bring a democratically justifiable judicial activism, relying on their temporarily enhanced independence under the political polarisation. But, if high-ranking prosecutors, who have devoted loyalty to an incumbent president, abruptly betray their political patron only due to the time factor, it is another matter because they cannot be considered to pursue a justifiable judicial activism but simply to reverse their partisan attitude in favour of the president to against him.

and indict criminal suspects, and correspondingly can substantially manipulate criminal proceedings, unlike common-law counterparts who generally exercise only the right to indict criminal suspects for trials.

For instance, two South Korean Presidents, Young-sam Kim (YS) and DJ, and Russian President Boris Yel'tsin, had once exploited the civil-law prosecutors for the politicisation of criminal justice, but faced their defection right before their retirement. Unusually, only Vladimir Putin could avoid this unfortunate fate among the South Korean and Russian Presidents after democratisation. If so, why would prosecutors serve a current president, but betray him in the last phase of his tenure, in the new democracies with the institutional combination of presidentialism and a civil-law prosecution system? By contrast, why would civil-law prosecutors unusually keep their loyalty to another president such as Putin, not betraying him at the end?

On the other hand, South Korean President MH could not keep the cozy relationship with prosecutors, and had his close allies investigated or even indicted by them during his entire incumbency, while repeatedly attempting large-scale reform against the prosecutors, which other former presidents suspended not to break the alliance with them. The cases of MH demonstrated that an incumbent president may encounter not just top-ranking prosecutors' betrayal in his last phase, but even their organisational resistance, under the institutional combination of a civil-law prosecution system and presidentialism. By contrast, Russian President Putin exceptionally avoided the organisational resistance and even succeeded in major reform against the civil-law prosecutors, by creating an 'investigative committee' in June 2007, among the South Korean and Russian Presidents. If so, why would a president face such a challenge from prosecutors and consequently fail in large-scale reform against them, whereas another president succeed in the reform, in young democracies with the institutional combination of presidentialism and a civil-law prosecution system?

Indeed, these observations run counter not only to the democrats' view that judicial officers accountable to electoral branches would be relatively less involved in the judicialisation of politics, but also to the liberals' stance that the judicial officers controlled by an incumbent government would often not prevent themselves from going in favour of the incumbent. Rather, a certain variation of the civil-law prosecutors' partisan behaviour towards an incumbent president can be expected to appear, depending on specific political conditions. Thus, the above research questions are selected to find frequent and infrequent patterns of strategic interaction between an incumbent president and prosecutors, and consequently to comparatively explore how the politicisation of criminal justice would appear, in not a few young democracies with the institutional combination of a civil-law prosecution system

and presidentialism, in the perspective of the new institutionalism.

1. 2. Literature review

1. 2. 1. Democracy and the rule of law

Modern democracies are complex and multi-dimensional institutional structures. Even though democracy is literally defined as ‘rule by the people,’ this abstract definition can hardly give an actual indication of how the people rule. Hence, many political theorists and scientists have not only proposed what the ideal may imply in practice, but also offered different while often overlapping definitions of democracy whereby the people can rule a state, by focusing on the empirical characteristics of political governance in different parts of the world (Held 2006: 3).

According to the tradition of Schumpeter’s minimalist definition (1954), a democratic state must have free competition based on a free vote, but the role of populace is restricted to deciding who governs, instead of what the government does. Przeworski *et al* (2000) also classified a state as democratic simply if both the legislature and the chief executive are elected in political contests. This is because the minimalists believe that adopting a fuller definition which covers the social justice or economic prosperity as a standard precludes the pursuit of democracy.³ In fact, it is obvious that this minimal definition is the most apparent expression of the people’s sovereignty, the citizens’ participation, and the equal rights allotted to their preferences. Above all, an open and pluralistic contest for positions of power is the distinct difference between autocracy and democracy. Because of the fallacy of electoralism, nonetheless, regular elections alone cannot make a regime a liberal democratic one. In the 1980s and early 1990s, several Latin American regimes actually enforced military domination and committed violations of other basic rights, in spite of their holding overall free regular elections (Karl 1986).

Besides electoral contests among political groups for government office, Dahl (1971) added political rights for a democratic process to the essential dimensions of democracy, via his famous concept of the ‘polyarchy.’ Here, political rights are integrated into the

³ For a more detailed explanation of the minimalist conception of democracy, see Przeworski (1999).

political liberty of communication and organisation (Dahl 1989: 221). These rights seem to go beyond the right to vote in regular elections as the core condition for the minimalist conception of democracy, but they are essential preconditions for a procedural democracy on account of their functions both to make organised competitive elections more fair and to develop unorganised pluralistic interests within civil society (Diamond 1994). Especially, these rights have to be institutionally embodied, not only in validity of the freedom of expression and association, but also in the healthy existence of influential private media.⁴ Through these institutionalisations, political rights can be guaranteed to realise the equal consideration, presentation, and formulation of all citizens' preferences in democratic processes. The degree of each institutionalisation is included also in the Index of Political Democracy (Bollen 1990) and the indicators designed for measuring the Polyarchy Score (Coppedge and Reincke 1991).

Yet, neither competitive elections nor political rights can be guaranteed, when civil rights cannot be defended from the violations of individual freedom which the state or any other private powers commit.⁵ These rights generally indicate the property and human rights that provide every citizen with legal and actual safety of private possession as well as with protection against any unjustifiable intervention such as arrest, exile, torture and terror. These are also included in the indicators of Freedom House (2006) to measure civil liberty. Even though few are not granted access to citizenship by reason of their semi-permanent minority positions regarding class, race, gender, age, religion, etc., these people or groups are *de facto* unable to equally participate in democratic processes. The disqualified groups may organise to encourage political participation as a form of social movement in order to achieve a more inclusive democracy (Eckstein and Wickham-Crowley 2003), but it is still hard to say that they are enjoying the basic rights for a democratic process based on actual political equality.

Then, the relationship between democracy and the rule of law should be suggested as an important issue. As the rule of law has been used in different manners and with no precise theoretical substantiation, it is a debatable concept (Nino 1996; Reitz 1997). In particular,

⁴ For the five criteria for democratic processes and political equality identified by Dahl, see Dahl (1989: 106-131; 1998: 27-40). In addition, for the seven institutional foundations embodying the five criteria to satisfy the 'polyarchy' as modern representative democracy suggested by him, see Dahl (1998: 85-91).

⁵ In fact, it is difficult to strictly separate civil rights from political ones. The freedom of expression, the existence of alternative sources of information, and the associational autonomy, among the seven institutions guaranteeing democratic processes of the 'polyarchy,' exactly overlap with some indicators of Freedom House (2006) to gauge civil liberty. Then the basic rights, which originated in the tradition of liberalism and have become more prevalent, are deemed as the civil rights.

it can frequently collide with democracy, since the two values are embodied in distinct institutional mechanisms (Ferejohn and Pasquino 2003: 243). Nonetheless, considering that an effective rule of law is an essential prerequisite for assuring the civil and political rights, and even a fair competitive election, it is apparent that a democracy cannot be consolidated without it.

The rule of law is the principle that a state ought to exercise its laws effectively and act only in accordance with clearly specified prerogatives. That is, it should be interpreted first as an issue about limitations and containment on the exercise of state power (Elster 1988: 2-3). Historically, the rule of law developed from growing control over monarchs through the constitution. It has its origins in the Lockean tradition of modern liberalism, which insisted on protecting individual property rights from the monarchs, especially for the bourgeoisie. As a result of the Glorious Revolution in England, for instance, the rule of law began to restrict the monarch's arbitrary capability to change rules and tax rates by limiting his legislative and judicial powers (North and Weingast 1989). Afterwards, as elections with mass participation and competition between multiple candidates or political parties have been introduced, and elected politicians have replaced monarchs through consecutive waves of democratisation, the rule of law has operated through politicians.

However, regular elections can impose only vertical accountability on elected politicians, which is at best temporary, but can seldom make them horizontally accountable to the rule of law. If a majoritarian or presidential government is not constrained by the constitution determining what it can and cannot do, the politicians may violate political and civil rights during inter-elections periods with no 'checks and balances' (Rose 2009: 12-15). Beyond simply producing unconstitutional acts related to policy-making or mega-politics issues, a political faction that dominates the executive branch can distort democratic processes via illegal administrative manoeuvres (Maravall 1999). This administrative arbitrariness could be committed not only by a majority government, but even by a divided or minority one. Sometimes, the political faction may attempt to change even the outcome of important elections. Hence, a judiciary that holds the independence from the other branches of government is considered one of the most effective ways to ensure the rule of law also in the context of democracy. This is founded on the belief that only courts which are insulated from politics can protect not just political oppositions but also every citizen covering all minorities from the arbitrary policies and legislations of a majoritarian government. Thus, several countries, including some new democracies, have increasingly permitted judicial

officers to manage their careers by themselves in a judicial council and consequently made them no longer accountable to the political authorities.

Obviously, judiciaries have obtained more institutional insulation than ever under this tendency of judicial independence. However, in fact, there are some other explanations for the actual political dynamic in which a ruling group voluntarily grants a judiciary its independence. For instance, Graber (1993) and Whittington (1999) suggest that a parliamentary majority could delegate politically divisive issues to a court, in order to avoid the blame, though it is unclear that politicians would actually tie their hands in this way, owing to the problem with cooperative delegation. Moreover, other literatures argue that an independent judiciary could be available for the legislature to keep the executive bureaucrats from its intents (McCubbins and Schwartz 1984), but this explanation is less applicable to parliamentary countries in which encouraging bureaucratic performance is typically more straightforward, due to a unified political leadership, than in presidential countries. Most importantly, according to the explanation focusing on “political insurance,” a ruling party would give more autonomy to the judiciary voluntarily, when the party is intimidated by the probability of regime change, which seems more useful for explaining how judicial officers could gain an insulated position from other branches of government (Finkel 2005; Magalhães 1999; Ramseyer 1994). That is, a judiciary is able to obtain independence from the political branches, because of a strategic choice by the ruling party on the grounds that the judiciary, which protects the opposition party today, will protect itself tomorrow. Actually in several new democracies, such as Poland, Hungary, Argentina and South Korea, judges could achieve the power to bring judgments or to exercise judicial review against the democratic bodies.

Meanwhile, several scholars focus on some political conditions which enable judges to behave more independently, rather than on the institutional arrangement exempting them from accountability to elected politicians. For instance, Caldeira (1986) and Vanberg (2001) suggest that the more public support a judiciary enjoys, the more autonomous decisions it can produce. Moreover, some others propose that a judiciary can make decisions more independently under situations of political polarisation or a divided government (Barzilai 1997; Chavez, Ferejohn and Weingast 2003). However, these arguments could be built only on the prerequisite of a somewhat insulated judiciary from the other branches of government (Helmke 2002: 301). It cannot be denied that judicial officers would hardly have an incentive to take judicial action against the chief executive, when their career and

fate are ultimately dependent on the executive branch (Olson 2000: 35).⁶ In not a few emerging democracies, an incumbent president could manipulate even judicial processes, not simply because he occupies a superpresidency with a strong veto power over the legislature, but because he holds monopolistic control over judicial careers during his fixed term.

However, independence from the political branches is never a value in itself, but merely one of the means to achieve judicial fairness (Shapiro 1981). Independent but partisan judges or prosecutors would often fail in ensuring the rule of law. Unless a judiciary is autonomous not only from a political majority but also from any interested sides, it cannot be acknowledged as truly independent at all (Kornhauser 2002: 49). Yet, such complete independence as an ideal type is impossible to achieve in practice (Russell 2001: 11-12). Since any judgment cannot be issued automatically by laws *per se*, but only through the interpretation and application of judicial officers, this cannot help but entail more or less subjective interests. Although the judicial officers had no self-interest, at least a form of technocratic domination against democracy, provoked by the judiciary as a guardian, may not be avoided as Weber (1978) and Dahl (1989) warned. Even an unselfish judicial officer cannot help but hold an ideological preference between the left-wing and right-wing policies (Tate 1995: 33-36). This is why more and more individuals and groups have been tempted to use the judicial officers politically, and correspondingly politics may be often judicialised.

However, a more critical problem is that the independent judges or prosecutors may apply laws unfairly, to advance their own interests. The question of who guards the guardian is raised (Acuña and Smulovitz 1997). For example, they might attempt to maximise the budget for their own organisation or defend their prerogatives as collective interests, and form an alliance with a particular political faction to realise their ambition or with a particular business to gain pecuniary reward as individual interests (Bancaud and Boigeol 1995; della Porta 2001; Santiso 2004). Then, laws are likely to be a privilege for the strong and rich, but a handicap for the weak and poor. The judiciary may be supposed to behave fairly in order to secure public trust, but it will do so at best in a long-term perspective. Therefore, some additional institutions should necessarily be complemented for granting judicial officers an insulated position from the other branches of government, otherwise the

⁶ As explained below, even the judicial officers who are accountable to the political branches can go against an incumbent government, when the government is outgoing or threatening their own interests.

officers should be dependent on and embedded in a democratic system (Bellamy 2013).

The recent expansion of judicial or constitutional review also has a similar, but more directly policy-related, effect on democracy with the judicial officers' insulated position from electoral branches (Ferejohn and Pasquino 2003; Stone Sweet 2000). Although it is not easy to distinguish between a tyrannical majority – discriminating minorities either procedurally or substantively – and non-tyrannical one,⁷ judicial review often causes a 'countermajoritarian difficulty' (Bickel 1986; Tushnet 1995). In particular, Dahl (1985: 72-73; 2001: 150-152) criticises the judicial review authority of the U.S. Supreme Court, on the grounds that the court frequently abandons its original obligation to enhance political equality, due to its preference for the privileged classes. And it has been also suggested that a globally strengthened judicial review power could contribute to reinforcing hegemonic capitalists on the basis of neoliberalism, rather than to enhancing the progressive concerns of distributive justice (Hirschl 2000; 2004).

It remains clear that judiciaries which are immoderately accountable to political authorities cannot retain the least independence, and often fail in supporting the rule of law, leaving a political majority to rule arbitrarily. In contrast, the activism provoked by an independent but political judiciary is also difficult to justify in terms of the rule of law in the context of democracy (Przeworski 2010: 104). That is, there are tension and trade-off between the mechanisms of judicial independence and accountability (Santiso 2004: 171-172; Vanberg 2008: 100-101). Depending on whether the emphasis is on the former or latter mechanism, all legal systems could be classified typically as either a common-law or civil-law system, although the legal systems of many countries are located on a spectrum between the two.⁸ And these two legal systems have aimed to preserve a balance between the rule of law and democracy via each institutional arrangement in developed democracies. Above all, such a division is more apparent in criminal justice systems or prosecution systems than other kinds of judicial systems in the perspective of new institutionalism. According to the new institutionalist approach, an institutional arrangement can have great effects on shaping the relevant actors' preference, strategy and behaviour, and therefore create some patterns of

⁷ Regarding the argument that judicial review should be limited to the procedural manoeuvres by a political majority, see Ely (1980). For the assertion that the authority should be expanded to substantive issues, see Dworkin (1985).

⁸ For the historical, ideological and institutional features of a civil-law and a common-law system, see Cappelletti (1989); Head (2011); Lundmark (2012); Reichel (2005) and so on. However, this research focuses mainly on the characteristics of criminal justice systems, especially of prosecution systems, in the two legal traditions, as it is a study on prosecutors and their politicisation.

interaction among them. Then, if all the actors have no incentive to change the institutional arrangement while being satisfied with it, an institutional equilibrium could be formed.⁹ This can be applied also to a common-law and civil-law prosecution system. As explained more elaborately in Chapter II, the former tends to grant prosecutors comparatively more independence but narrower powers, whereas the latter is inclined to make prosecutors relatively more accountable to the electoral branches but allow them broader powers, both of which have contributed to fair criminal proceedings, particularly of high-profile cases involving a certain political faction or big business. Indeed, the two types of prosecution system have preserved their own institutional equilibrium.

Therefore, if civil-law judicial officers, especially prosecutors, obtain more independence than previously, in the global trend of judicial independence along with the consecutive waves of democratisation, their judicial activism could more seriously distort democratic processes, intensifying the danger of the judicialisation of politics via criminal proceedings, than their common-law counterparts' activism (Maravall 2003: 279; Zannotti 1995: 182-183).¹⁰ Then, an institutional disequilibrium can arise. However, in the majority of civil-law countries, prosecutors who hold a decisive power rather than judges in criminal proceedings are still required to be accountable to the executive leadership, as noted above. Thus, at first glance, this could be regarded as creating few problems to break the balance between the rule of law and democracy in the perspective of new institutionalism. But one more problem which has not received attention still remains. That is, even accountable prosecutors may not necessarily keep themselves from being involved in the politicisation of criminal justice, depending on the variation of form of government. In the next part, the debates on this issue are reviewed.

1. 2. 2. The politicisation of criminal justice

Some previous literatures, giving attention to the political economic incentive structure of specific institutional arrangements in the new institutionalist perspective, account for the dynamics of alliance and separation between elected politicians and judges or prosecutors around criminal proceedings as the politicisation of criminal justice (della Porta 2001; Di Federico 1995; 1998; Guarnieri 2003; Maravall 2003). As Maravall (2003: 262) points out,

⁹ For the new institutionalism, refer to Hall and Taylor (1996); Lowndes and Roberts (2013); March and Olsen (1984; 1989); Peters (2012); Thelen (1999); Thelen and Steinmo (1992), and so forth.

¹⁰ For these balances and imbalances between the rule of law and democracy attributed to defects of the two prosecution systems, Chapter II will provide a more detailed explanation via the cases of typical countries.

the corresponding sort of the judicialisation of politics is conceptually different from judicial activism by which courts not only make a final decision on issues that ought to be disputed in policy-making processes, but even play the role of ultimate arbiter between opposing stances in salient political controversies. Although both occur as a form of the judicialisation of politics, the former is more closely connected to the ‘rule of law as a political weapon’ that allows judicial officers to influence democratic processes such as national elections or negotiations over important legislations within an assembly, and even to change their result, by manipulating criminal proceedings. Thus, political forces would increasingly attempt to abuse judges or prosecutors as an effective instrument in order to stigmatise their political enemies as immoral or even criminal suspects.

However, the limitations of politicians’ democratic accountability, suggested by Maravall (2003: 263), as the most pivotal precondition for which the judicialisation of politics via criminal proceedings increases, seem rather ambiguous. Furthermore, he reveals some logical loopholes in building his deductive propositions.¹¹ Notwithstanding that Maravall (2003) focuses on the incentives for politicians to make use of such a strategy, he does not consider the benefits and costs for the politicised judges and prosecutors when supporting or defeating the politicians. He presents only the recently enhanced independence of civil-law judicial officers, who hold greater jurisdiction than common-law ones, as the changed institutional condition for an increase in the politicisation of criminal justice.

In a part of civil-law countries, judicial officers’ political interests have actually had less importance than ever, because judicial councils decide to promote them to higher ranks *de facto* only on the basis of seniority and therefore they enjoy institutional independence both internally from their superiors and externally from the other branches of government (Guarnieri 2003).¹² However, as discussed previously, they still have other collective or

¹¹ For example, in providing the preconditions for his second argument, Maravall (2003: 263) writes, “This may or may not be due to a lack of accountability of the government. Different circumstances can give a persistent advantage to the incumbent: elections may be strongly ideological and the median voter may be with the government: the leader of the ruling party can be very popular. The opposition, however, does not turn to dictatorship: it introduces new dimensions of competition in which judicial activism becomes instrumental.” Indeed, these premises look excessively unclear because they depend on too vague and too many assumptions as variables. Thus, it is hard to say that his arguments are built on elaborate preconditions.

¹² One of the most effective ways to ensure the independence of a judiciary is to transfer the control over judicial careers to the members’ own council. Among the authorities on the personnel matters, the decisional power to advance lower-ranking judicial officers to higher ranks, and to appoint them to core or top-ranking posts are most important, since budget, tenure, protection, etc. are merely collective and non-competitive rewards, and are guaranteed at least formally in most cases (Ehrmann 1976: 76-78). Consequently, when every judicial officer is able to gain promotion to the highest rank just on the basis of seniority, the individual independence of judges or prosecutors can be maximised. Otherwise, judicial officers can obtain the highest-level independence, when they are directly elected as in several states of the U.S.

individual political interests in protecting their broad jurisdiction as a prerogative or in gaining other high-level state posts or parliamentary seats (della Porta 2001; Di Federico 1998). In addition, as not only the organisational hierarchy of civil-law judicial officers but also democratic control over them have concurrently been weakened, they could be more frequently bought off by private interests such as big businesses or even the mafia than common-law judges and prosecutors, given the former's relatively wider jurisdiction over criminal procedure (Bancaud and Boigeol 1995).

Accordingly, Di Federico (1995; 1998) and della Porta (2001) examine the benefits for civil-law judicial officers from the politicisation of criminal justice, paying attention to their no longer controlled extensive power as they got insulated from electoral branches. For example, any political faction can neither easily reform their prerogatives, nor curtail their wages or status which tends to be higher than that of other state officials, because of their unchecked but strong power (Zannotti 1995: 181-204). Furthermore, if a political party nominates judicial officers as legislative candidates or grants them ministerial-level posts through a political barter, they would have a stronger incentive to exercise their far-reaching powers, via criminal proceedings, against opponents of the party. Consequently, unaccountable judicial officers, especially powerful civil-law ones, can deepen the danger of the judicialisation of politics by forming an alliance with the ruling political faction or the oppositions or even any business powers, depending on their vested interest in each alliance rather than on the ambiguous preconditions provided by Maravall (2003: 263-264).

Above all, it is appreciable that Di Federico (1995; 1998) concentrates more attention on civil-law prosecutors than the judges, in contrast with other scholars. In fact, judges have difficulty in exercising initiative to influence important democratic processes such as mid-term general elections, since they can issue no decision without the prosecutor's pre-trial actions, even though they can also play a critical role in damaging politicians' moral legitimacy, sometimes leading them to defeat. Judges are only able to influence politicians reactively, when such an opportunity becomes available (Ginsburg 2008: 71). In contrast, civil-law prosecutors can wield undue influence on democratic processes with their own timing and extent, since they hold both the power to investigate and indict suspects in criminal proceedings. Therefore, they can selectively make a politician a criminal suspect without much cost. Especially in some new democratic countries, prosecutors inherited much greater power over criminal procedure, even compared with those of other traditional civil-law countries (Lee 2007a; Mikhailovskaya 1999). Moreover, vigorously competition

from the media to obtain valuable information about political scandals would increase their influence (Jiménez 1998). Rather, whether a politician under suspicion will be given an acquittal from courts in the future may not be so meaningful, since civil-law prosecutors have already achieved their intended goal, such as the construction of a political situation favourable to the political faction whom they support or themselves at a perfect time and place, by paralysing the politician's legitimacy at least temporarily (Di Federico 1995: 239). Hence, their partisan institution of criminal proceedings could have a more fatal effect on competing actors in democratic processes, such as a national election, than the judges' final decisions. It seems obvious that civil-law prosecutors must be regarded as one of the major actors in the politicisation of criminal justice.

However, it is difficult to say with certainty whether Di Federico (1995; 1998) provides all the conditions for frequent patterns of the politicisation of criminal justice, because there are few cases such as the Italian or Brazilian prosecutors, who enjoy independence from the political branches as well as the great power over criminal procedure. In many civil-law countries including young democracies, the prosecutors' office, unlike the judiciary, is still vertically subject to the other branches of government, the executive in particular.¹³ If so, have the civil-law prosecutors, who are democratically required to take accountability for elected politicians, actually been induced to remain politically neutral, and seldom been misused as a destructive political weapon? Unfortunately, a civil-law prosecution service accountable to democratic bodies also frequently manipulates criminal proceedings against particular politicians. Instead, the degree of the politicisation of criminal justice, as a result of the strategic interaction between an incumbent government and prosecutors, could be variable according to the intensity of the prosecutors' power in criminal proceedings as well as whether a consensus form of government or a presidential system – in spite of the common ground that the executive branch controls the prosecutors' careers – is operated.

However, the previous literature has seldom aimed to explain the political dynamics of presidential predominance associated with the politicisation of criminal justice. Indeed, it is surprising that the literatures provide approximate examples of the politicisation of justice, limited to the descriptions of the delegative or illiberal democracy (Merkel 2004; Kubicek 1994; O'Donnell 1994; Zakaria 1997). In these precarious democratic countries,

¹³ In not a few countries, civil-law prosecutors officially belong to the judiciary, while common-law ones are formally attached to the executive branch. Nonetheless, in the majority of cases, civil-law prosecutors are controlled, through the organisational hierarchy, by elected politicians, but common-law prosecutors enjoy an individual autonomy, despite their post belonging to the executive. For this, Chapter II will explain more closely.

an incumbent president has often violently silenced the judiciary without any horizontal accountability, under the pretext of addressing national crisis or emergencies, relying on his plebiscitary legitimacy or superpresidentialism and its decree power (Uprimny 2004).

But the literatures still do not clarify the important difference between a judiciary that has to be accountable to elected politicians, through the executive leadership's control over judicial careers, and another that does not. Obviously, a president has more resources for the benefit of judicial officers than a prime minister in a cabinet regime. Nonetheless, the president cannot unilaterally abuse the judiciary or the prosecution service to exclude his political rivals from democratic processes and to stand up for his faction, unless there is a certain institution enabling him to consistently extract their loyalty. Strictly speaking, even the imperial power of superpresidency lies not directly in the strong presidency itself, but in its monopolistic domination over judges or prosecutors as an effective political weapon against his opponents. Superpresidentialism can mainly allow the president more extra-constitutional rights for bypassing vetoes of the legislature than other presidential systems, but cannot grant him the power to weaken or remove his political enemies in the name of the rule of law.

On this matter, Olson (2000: 35) assumes that the judicial branch is bound to expand the personal power of a chief executive when it is ultimately managed by him. Therefore, judicial officers have no choice but to defer to the highest political leadership which holds a monopoly over their careers in authoritarian regimes (Magaloni 2008a: 182-190). In presidential democracies, similarly, an incumbent president can dominate the judiciary, selecting top-ranking judicial officers and controlling the organisation hierarchically, during his fixed tenure. As mentioned previously, while a judiciary would become more autonomous and could bring judicial action even against the president's preference in a divided government or in high public support of the branch itself, another judiciary which is insufficiently insulated from the political branch can hardly do so. In numerous countries, irrespective of legal traditions, judges who obtained more independence than ever have increasingly behaved as predicted, though they are not necessarily fair. However, civil-law prosecutors would hardly have incentives to go against an incumbent president but to devote loyalty to him, even in a situation of political polarisation or in high public support for themselves, if their career and future are still dependent on him.

In the old European consensus democracies, on the one hand, civil-law prosecutors can be

motivated to exercise their extensive power impartially thanks to the consensus within a coalition cabinet, not through the power concentration in a chief executive as presidency. As the forms of consensus government could ensure relatively suprapartisan control of the state bureaucracy, the prosecution service could also remain fair and politically neutral.¹⁴ On the other hand, in common-law countries, for example, the U.S., England or Canada, neither prosecutors nor police officers can hold dominant power over pre-trial criminal procedure, owing to the separation of powers between the two law enforcement agencies. As any politician including an incumbent president has to pay the additional transaction cost in coordinating informal cooperation between the prosecutors and police officers for the political manipulation of criminal proceedings, he cannot easily misuse criminal justice in order to exclude his political enemies from the democratic process.¹⁵ That is, common-law prosecutors do not have enough power to seriously distort democratic processes via criminal proceedings, unlike civil-law equivalents.¹⁶

1. 3. Research hypotheses

In several new democratic countries, an institutional disharmony was actually created as presidentialism was combined with a civil-law prosecution system, whereby prosecutors not only possess extensive power but are also accountable only to a chief of the executive branch. As Carey (2005: 95-97) reports, an overwhelming number of young democracies introduced such a presidential system which granted the presidency almost exclusive authority over the formation and management of the executive branch, in line with the Third Wave of democratisation. In these new democracies, even career bureaucrats who ought to hold little partisanship have been overpoliticised, especially via the practice in which a president frequently selects his ministers from the bureaucratic career ladder, in

¹⁴ Dependent on the more consensual governance, a coalition government can make judicial officers less politicised in a parliamentary or dual executive system, than a presidential government in a presidential system. About the institutional causes of the important difference between the judicial behaviours under the consensus forms of government and under a presidential system, Chapter II will explain more in detail.

¹⁵ In addition, U.S. Presidents cannot vertically control prosecutors via a single organisational hierarchy, because of the federally decentralised structure of the prosecutor's offices.

¹⁶ This does not mean that politics is never judicialised via criminal proceedings. Strictly speaking, also in the U.S. the politicisation of criminal justice has often appeared (Crenson and Ginsberg 2004: 91-96). But the political dangerousness from the politicisation of criminal justice can be even less serious in this country than in civil-law countries, because normal prosecutors have no such extensive power to manipulate criminal proceedings, which will be discussed more elaborately in Chapter II. In the U.S., instead, the politicisation of criminal justice is intensified mostly through special prosecutors who hold both the powers of criminal investigation and indictment, but even these high-profile criminal cases can hardly be manipulated due to the national attention on them.

composing the cabinet. In this connection, presidentialism of these new democracies is defined by this study as a presidency possessing a strong appointment power over the prosecution service as well. At the same time, some of the countries inherited a civil-law prosecution system from the past undemocratic regimes. Thus, for instance, both in South Korea and Russia, prosecutors rarely lost their enormously wide power across all the pre-trial stages of criminal procedure, while a presidency with the broad appointment power was adopted during their democratic transitions (Colton 1995; Frye 1997; Park 2004).

Also, this study takes a concept of political competition in new democracies, which is defined by Vorrath, Krebs and Senn (2007: 9-10) as a condition that can readily turn into political conflicts or polarisation, between a ruling and opposition forces, when its degree is high. Then, under the institutional combination of a civil-law prosecution system and presidentialism, an incumbent president would frequently seek to exploit the far-reaching power of the prosecution service, and correspondingly most of the senior prosecutors who wish to progress their career would display a partisan behaviour in favour of him.¹⁷ In emerging democracies, as a consequence, the incumbent president can politicise criminal justice to tactically damage the moral foundations of his political enemies or to grant impunity to his close allies. Obviously, this ruling style is distinguished from the delegative or illiberal democracy in which a current president merely disregards the legislature, the state bureaucracy, and even the judiciary, relying on his temporary popularity and the *decretismo* (Colton and Skach 2005: 119-121; Shevtsova 2004: 69). Occasionally, some presidents such as Putin in Russia could exercise a semi-authoritarian power, relying on the politicisation of criminal justice in their favour. A civil-law prosecution service, which is accountable only to an incumbent president rather than to multiple democratic bodies, cannot help but corrode the rule of law as a prerequisite for the consolidation of democracy, though this will be discussed more elaborately in the next chapters.

Yet Olson (2000: 35)'s assumption that judicial officers controlled by the chief executive would contribute only to the expansion of his personal power seems too static, because not all presidents can permanently control them. According to Helmke (2002; 2005), indeed, top-ranking judges can betray an incumbent president in the last phase of his tenure, for their career development as individual interest, along with electoral cycles. In emerging

¹⁷ Then, the prosecution service cannot be assumed to behave as a fully unitary actor. For example, there would appear a somewhat difference between the interests of low-ranking and high-ranking prosecutors, or between the interests of a (provincial) faction and another within this organisation, in some specific conditions. As explained in the next chapters, nonetheless, civil-law prosecutors behave as a considerably unitary actor in the majority of cases.

democracies, moreover, a high level of political competition can also increase a possibility of government changes, because of the existence of strong opposition parties or forces. In actuality, several presidents used to face hostile investigations or indictments by civil-law prosecutors, and the strategic defection of prosecutors who held far-reaching power could more seriously damage the presidents' authority in their last phase, than that of the judges, and further trigger his 'lame duck' phase. As noted above, in South Korea and Russia after democratisation, some family or inner-circle members of most presidents, such as YS, DJ and Yel'tsin, were intensely investigated or even indicted by the prosecution service right before their retirement. Only Putin unusually avoided this unfortunate fate.

On the other hand, as explained above, it must also be remembered that an incumbent ruling group used to voluntarily grant a considerable independence to the judiciary for "political insurance" for losing its government or hegemony, in many countries, especially young democracies. Likewise, incumbent presidents might also pursue their long-term interest in curtailing the civil-law prosecutors' substantially broad power over criminal procedure, though they would be more frequently tempted by their short-term interest in the abuse of the prosecution service because of its high value as a political weapon. Nonetheless, if an incumbent president pushes ahead with major reform against civil-law prosecutors, he would be in a conflict with them even in the middle of his tenure. The then prosecutors' defection to protect their prerogative as collective interest can be regarded as a kind of the organisational resistance based on their great power, which is more coherent than their mere betrayal, led by top rankers, for their career development as individual interest in the last phase of a president. That is, the civil-law prosecutors' organisational resistance as a collective action can be significantly threatening to an incumbent president, in spite of his ultimate control over their careers, in high political competition. Also in South Korea and Russia, most presidents suspended any large-scale reform programme against the prosecution service, but were only satisfied with minor changes. As mentioned above, President MH and Putin did unusually not abandon curtailing the prosecutors' enormous power, but MH was faced with their violent counterattacks during his entire incumbency. Exceptionally, only Putin could be successful in major reform against the civil-law prosecutors in his second term.

In sum, first, it is required to explain why an incumbent president who had exploited civil-law prosecutors could not help but encounter their defection, particularly the top rankers', when he was outgoing, whereas another could secure their loyalty to the end. Secondly, it

is necessary to examine why an incumbent president had difficulty in curtailing the civil-law prosecutors' extensive power, in spite of his vertical control over their careers, facing their organisational resistance, whereas another could succeed in large-scale reform against them. To answer these questions and explain the dynamics of the politicisation of criminal justice in the new democracies with the institutional combination of presidentialism and a civil-law prosecution system, this research builds three hypotheses as follows.¹⁸

Hypothesis I: if political competition is high and an incumbent president seeks to abuse the civil-law prosecutors' extensive power, they would serve the president but betray him in the last phase of his tenure (Hypothesis I-1), and any major reform plan against the prosecution service would be suspended (Hypothesis I-2).

Hypothesis II: if political competition is high and an incumbent president pushes ahead with major reform against the civil-law prosecution service, the prosecutors would make an organisational resistance against him and consequently the reform would fail.

Hypothesis III: if political competition is eliminated, civil-law prosecutors would neither defect against an incumbent president through their betrayal in his last phase, nor through their organisational resistance when he attempts major reform against them.¹⁹

Verifying the above hypotheses has three academic implications. First, prosecutors are unlikely to maintain political impartiality, but to take a partisan position either in favour of or against an incumbent government, under the institutional combination of a civil-law prosecution system and presidentialism. Secondly, the variation of political competition can seldom influence judicial officers accountable to the political branches to behave independently of politics, but can influence them, particularly the top rankers, to betray an outgoing government, especially a president. Thirdly, and most importantly, the variation of political competition can have an effect on the judicial officers' organisational ability to protect their collective interests, and consequently influence the success of an incumbent president's reform against them, in particular strong civil-law prosecutors.

¹⁸ The theoretical resources and corresponding frameworks which can upgrade these hypotheses into the empirically testable arguments will be provided in Chapter II.

¹⁹ Unless civil-law prosecutors organise resistance against an incumbent president when he launches major reform against them, they would naturally have no reason to betray him in the last phase of his tenure. For this logical sequence, the next chapters will explain again.

1. 4. Cases, method and structure of research

1. 4. 1. Cases and method of research

To begin with, the reason why South Korea and the Russian Federation, can be selected as the scope of this research is the difference between the two countries. South Korea and Russia can represent different degree stages among the newly democratised countries, in line with the Third Wave of democratisation, since the former is evaluated as one of the most successful new democracies while the latter is not. In addition, South Korea and Russia can be regarded as two typical but different countries among the numerous new democracies, because the former transitioned from a military authoritarian regime whereas the latter came from a totalitarian regime. These reasons seem to correspond with the prerequisites of the ‘most different systems design,’ strongly suggested by Przeworski and Teune (1970), for a comparative study. Then, strictly speaking, this research is designed to concentrate on a similar institutional arrangement across South Korea and Russia as the *independent variable*, and to take the relationship of two main political actors in the institutional arrangement as the unit of analysis, within the new institutionalist perspective. On the one hand, the choice of the two countries is reasonable in the respect that the unit of analysis can be certainly controlled through the selection of the most different countries, as Maggetti, Gillardi, and Radaelli (2013: 57) imply. On the other hand, however, the ‘most similar systems design’ is also applied for this research, because the two intervening variables are identified to influence the causality between the *independent variable* and *dependent variable*, in the cases of six periods across the two countries.

As mentioned above, this thesis aims to find general patterns of the strategic interaction between an incumbent president and prosecutors, in young democratic countries with the institutional combination of a civil-law prosecution system and presidentialism. Thus, the two common institutional preconditions of South Korea and Russia – (i) an extremely centralised criminal justice system in civil-law tradition; and (ii) a presidential system that permits a broad appointment power to an incumbent president – are supposed to form an ‘isolated’ institutional arrangement, as the *independent variable*, to cause the prosecutors’ partisan behaviour. Then, the *moderating variable*: whether political competition is high or negligible, and the *mediating variable*: whether an incumbent president seeks to exploit or to reform against civil-law prosecutors, are predicted to have an influence on the latter’s

partisan behaviour as the *dependent variable*: (i) to serve the former; (ii) to betray the former; or (iii) to collectively resist the former.

Accordingly, this study will examine four of the total six periods containing comparable cases, in South Korea and Russia, to test the validity of Hypothesis I, considering that this hypothesis indicates the causality in the most frequent pattern of the interaction between an incumbent president and prosecutors. That is, all the relevant cases, during President YS's period (December 1992 – December 1997) and DJ's period (December 1997 – December 2002) in South Korea, and during President Yel'tsin's two terms (June 1991 – December 1999) and Putin's first term (December 1999 – March 2004) in Russia, will be empirically analysed to find the most frequent pattern of the strategic interaction between the two actors.²⁰

There is one more important reason why South Korea and Russia should be selected, while quite a number of countries, across South and East Europe, Latin America, and East Asia, not only inherited a civil-law prosecution system but also adopted a presidential system, along with the Third Wave of democratisation. The two countries include some notable but unusual patterns of the strategic interaction between incumbent president and prosecutors, respectively. This selection accords with the suggestion from Mitchell (1983), Stake (1995) and Yin (2003), in which the adequacy of cases for research purposes, such as a theoretical generalisation, is as critical as the typicality of cases. As mentioned previously, President MH repeatedly launched large-scale reform against civil-law prosecutors but failed, facing their organisational resistance, in South Korea, while President Putin could exceptionally succeed in major reform against civil-law prosecutors, not facing their organisational resistance, in Russia. This is also why Hypothesis II and III were proposed. However, this study must resolve the methodological problem that both the patterns cannot help being found only through South Korean President MH's period (December 2002 – December 2007) and Russian President Putin's second term (March 2004 – March 2008), respectively. That is to say, this comparison may seem to encounter the criticism that different outcomes in different cases are natural, and hence the contrasting outcomes between in South Korea and Russia cannot be regarded as comparable cases in terms of the 'most different systems design.'

²⁰ Of course, if Hypothesis I, which indicates the most frequent pattern of the interaction between the two actors, is commonly identified in the cases across South Korea and Russia, the influence of the *independent variable* can be verified. If so, the selection of the two countries can be naturally justified also in terms of 'the most different systems design.'

Yet, as discussed above, both patterns happened within the ‘isolated’ similar institutional context between South Korea and Russia. Even the contrasting outcomes across the two countries can no longer be regarded as inappropriate cases against the principle of the ‘most different systems design,’ but as quite researchable cases in the perspective of the new institutionalism based on the ‘most similar systems design.’ In addition, this study can solve this problem logically as well. On the one hand, the relevant cases during South Korean President MH’s period will be analysed to identify why the *dependent variable* arises, according to Hypothesis II. This can be recognised as raising few methodological problems for this comparative research, because Hypothesis I and II can be equally applied to the empirical cases of South Korea. On the other hand, the relevant case during Russian President Putin’s second term will be analysed to identify why the *dependent variable* arises, according to Hypothesis III of this thesis. This can also be recognised as raising few methodological problems for this comparative study, because Hypothesis I and III can be equally applied to the empirical cases of Russia. As a result, it can also become logical to comparatively verify that the success of large-scale reform against prosecutors depends on the *moderating variable*, under the institutional combination of a civil-law prosecution system and presidentialism, via the relevant cases during the President MH’s period and Putin’s second term in the two different countries.

In short, the selection of South Korea and Russia is expedient for this thesis, as we expect to find general patterns of the strategic interaction between an incumbent president and prosecutors, in the new institutionalist view, by analysing the comparable cases of the five presidents’ six periods for about 15 years, in the two typical countries with the institutional combination of presidentialism and a civil-law prosecution system, newly emerging along with the Third Wave of democratisation.

On the other hand, this thesis attempts to verify Hypothesis I, II and III, analysing the relevant cases for about 15 years in South Korea and Russia after democratisation, on the basis of a typical qualitative method. As this comparative study aims to achieve its goal via the close examination of a relatively small number of cases, I will use plenty of primary and secondary sources, but minimally rely on the statistical data available for comparative studies on a relatively large number of cases.

To begin with, I rely on two main and other minor primary sources. As the first main

primary source, various legal materials of South Korea and Russia are utilised. These can cover not only the civil-law prosecutors' roles and powers in a criminal proceeding as well as their organisational setup, but also the incumbent president's constitutional and practical powers in appointing figures to ministerial-level posts including high-ranking positions in the prosecution service, in the two countries. As the second major primary source, I use press materials, in order to find relevant facts and testimonies, mostly from several kinds of domestic newspapers and periodicals in the two countries, as well as international ones. Together with these main sources, some other primary sources are also examined. These other materials include sources derived from government agencies, civic organisations and businesses, as well as key figures' autobiographies or memoirs. Although I rely relatively less on the sources, they can also contain valuable information. Moreover, a few interviews with some actors directly or indirectly involved in the cases, or specialists with a thorough knowledge of the theme of this thesis were conducted, which is expected to contribute to finding or verifying critical logics and facts for this research.

In addition, the thesis obviously takes full account of the voluminous literature in the form of books, journal articles and conference papers that are relevant to its subject and which have appeared in Korean and Russian as well as English.

1. 4. 2. The structure of thesis

In Chapter II, first, through which institutional arrangement, a balance between the rule of law and democracy, around criminal proceedings, can be preserved in traditional common-law and civil-law countries, respectively, will be considered. Second, why the institutional harmony between a civil-law prosecution system and a consensus form of government can be ensured in continental European countries will be explained. These two parts will not accompany deep empirical case studies but seek to identify the logics of their institutional equilibrium. By contrast, thirdly, why the institutional disharmony between presidentialism and a civil-law prosecution system cannot help but develop in new democracies will be explained in the comparative perspective with the former. Moreover, why such institutional disharmony cannot easily be corrected to guarantee a balance between the rule of law and democracy in the young democracies will be explained. This third part will be suggested as the main framework of this empirical research.

In Chapter III, first, the prosecution service which contains the main features of a civil-law

prosecution system, and the strong presidential system that enables a president to manage the executive branch exclusively in South Korea after democratisation, will be presented. It is because the combination of these two preconditions could be assumed to construct an institutional context, in which the two main political actors to produce certain patterns of the politicisation of criminal justice, according to the hypotheses of this thesis. Secondly, why an incumbent president can enjoy priority in abusing the prosecutors' extensive power against his political opponents during most of his tenure, but faces the defection of the prosecution service in his last phase, under the discordant institutional combination, will be explained via the analysis of some empirical cases during South Korean President YS's and DJ's periods.

In Chapter IV, first, why no institutional reform to curtail the prosecutors' enormously wide power over criminal procedure could be launched, or only minor changes on their power bases could be attempted and achieved in the emerging democracies with the institutional combination of presidentialism and a civil-law prosecution system will be explained via the analysis of some empirical cases during President YS's and DJ's periods. Secondly, why an incumbent president could not succeed in large-scale reform against civil-law prosecutors, despite his repeated attempts at reform, will be explained, by analysing some empirical cases during another South Korean President MH's period.

In Chapter V, first, the civil-law prosecution service and the strong presidency in Russia after democratisation, which share their main features with those of South Korea, will be presented. Secondly, why Russian President Yel'tsin had misused the prosecution service as a destructive political weapon during most of his tenure, but encountered the prosecutors' defection in his last phase, like President YS and DJ in South Korea, will be explained through the analysis of some empirical cases during his tenure. Thirdly, why another Russian President Putin could not only abuse the civil-law prosecutors' enormous power, but also avoid their betrayal at the end of his second term will be explained, by analysing some empirical cases during his tenure, in comparative perspective.

In Chapter VI, first, why no institutional reform to curtail the prosecutors' enormously broad power over criminal procedure could be attempted, or only minor changes in their power bases could be launched and accomplished in Russia, as in South Korea, will be explained through the analysis of some empirical cases during President Yel'tsin's two terms and Putin's first term. Secondly, why President Putin was exceptionally successful in

introducing large-scale reform to curtail the prosecutors' massive power will be explained, by analysing the empirical case of his creation of an 'investigative committee' in June 2007, in his second term, in comparative perspective.

Finally, Chapter VII contains an overview of the thesis as a whole and goes on to consider the theoretical as well as practical implications that flow from it.

Chapter II: A civil-law prosecution system and presidentialism - discordant institutional combination

Despite much debate about the rule of law, it “literally” means no more than judges and prosecutors who interpret and apply laws impartially to everyone including the state. As noted above, to ensure independence and impose accountability on judicial officers could be regarded as the two mechanisms that have been traditionally used to accomplish the impartial judicial processes. For instance, common-law countries rely more on the former, whereas civil-law countries depend more on the latter. However, most countries are bound to have a mixed form of the two typical legal systems by its nature, and even a partial convergence has recently appeared (Schlesinger 1995: 477). The global trend of judicial activism has tended to contribute to such a convergence. Nonetheless, not only the ideal types, but also practical categories, can be still classified into a common-law and civil-law tradition, particularly regarding their criminal justice system. Hence, to begin with, this chapter clarifies which institutional configurations are able to induce judicial officers, particularly prosecutors, to make fair decisions in criminal proceedings, focusing on the institutional difference between common-law and civil-law prosecution systems. Secondly, this chapter explains why a civil-law prosecution system necessarily requires a consensus form of government. Thirdly, and most importantly, why a civil-law prosecution system tends to be disharmonious with a majoritarian democracy, especially with a presidential one, is explained as the main framework of this thesis. Then the former two parts do not entail deep empirical case studies but provide a frame of reference for the construction of the main framework of this empirical research in the third part. In other words, under the institutional combination of a civil-law prosecution system and presidentialism, neither can prosecutors contribute to a balance between the rule of law and democracy, in criminal proceedings, nor the imbalance be easily corrected.

2. 1. Two types of prosecution systems in the era of the judicialisation of politics

2. 1. 1. The global expansion of judicial activism, and prosecutors

Although there are a lot of differences between common-law and civil-law traditions, the two legal systems have upheld a balance between the rule of law and democracy via each institutional arrangement. In common-law countries, especially the U.S., judicial officers' insulated position and decentralised judicial review *per se* have made a high potential for judicialisation of politics or the politicisation of justice, but some additional institutions can restrain their jurisdiction and therefore induce them to apply laws as impartially as possible. However, in some traditional common-law countries, including Canada, judicial activism has been strengthened and therefore a danger of the judicialisation of politics has been intensified, as the judiciary recently obtained more power resources, such as the bill of rights or abstract judicial review (Dickson 2007; Gardbaum 2013; Hirschl 2008: 131). In contrast, a civil-law system has prevented judges and prosecutors from catalysing the judicialisation of politics, by inducing them to exercise their broad jurisdiction with accountability to democratic bodies. But, even in traditional civil-law countries, such as Austria, Germany, or Italy, which adhered to parliamentary supremacy, some conditions for judicial activism have been provided, as not only the influential constitutional court with the abstract or concrete judicial review power was adopted, but judges and prosecutors also attained more independence from the political branches, since the Second World War (Ferejohn and Pasquino 2003; Guarnieri and Pederzoli 2002; Stone Sweet 2000).

Moreover, also in several emerging democratic countries that transformed recently from authoritarian or totalitarian regimes, along with the Third Wave of democratisation, the judicial officers' independent position as well as judicial review has been reinforced (Chavez 2008; Guarnieri 2003; Ginsburg 2003; Magalhães 1999; Santiso 2003; Yang 1993). For instance, Spain and Portugal in Southern Europe, Hungary, Bulgaria and the Czech Republic in Eastern Europe, South Korea and Mongolia in Asia, and Argentina, Mexico and Brazil in Latin America have fortified the judicial officers' insularity and jurisdiction, allowing them to administer their own personnel matters in a judicial council, and giving the judiciary or the constitutional court the authority of judicial review. As a result, the tendency of judicialisation of politics could not help but expand globally.

Then, some institutional reforms of the judicial bodies might be taken, under the ideas for the purpose of severance of the previous undemocratic legacies and achievement of the rule of law, but this pretext alone cannot fully explain the actual causes of this trend of judicial supremacy. As provided in Chapter I, the explanation that a ruling force would voluntarily give more independence to the judiciary for “political insurance” on the risk of regime changes or electoral defeats seems most useful, in answering why judicial officers could obtain the institutional security from the other branches of government, or judicial review power (Finkel 2005; Hirschl 2000; Magalhães 1999; Ramseyer 1994). Although there are a few other explanations on why incumbent politicians would voluntarily grant judicial officers more insulated position and jurisdiction than previously, as noted above, I shall not discuss it again here, because this issue is beside the main theme of this thesis.

Instead, a more important point is that both common-law and civil-law judiciaries are on their way to gaining more independence, in all the aspects of behaviour, organisational setup and judicial review, along with the global trend of judicial supremacy, than to being democratically required more accountability, while there still remains critical differences of the institutional interactions between democratic bodies and the judiciary in the two legal systems. Then, an increase in the autonomy of common-law judicial officers may neither more intensify the danger of the judicialisation of politics than ever, nor seriously upset the balance between the rule of law and democracy, considering that they were already fairly independent from political authorities by nature. In contrast, according to Maravall (2003: 279), a careless insulation of civil-law judicial officers from electoral branches, without the institutional elements of a common-law system which keep judges or prosecutors from taking partisan behaviour, could bring a political dilemma. That is, when unaccountable to any democratic body, civil-law judicial officers can deepen the danger of the judicialisation of politics, especially through criminal proceedings, and therefore seriously undermine the balance between the rule of law and democracy.

Then, as discussed above, prosecutors should be regarded as a more important actor than judges, given their pre-emptive power over criminal procedure, in the politicisation of criminal justice. The political danger of unaccountable civil-law prosecutors has already been pointed out (Di Federico 1995; 1998). In the new institutionalist perspective, criminal justice can be frequently politicised through independent prosecutors, but the danger of political distortion of criminal proceedings is relatively lower in common-law countries, whereas civil-law prosecutors can manipulate criminal proceedings, when accountable to

no other branch of government. Moreover, in some new democracies, the prosecutors have often taken a partisan behaviour, despite their accountability to a democratic body. If so, why do civil-law prosecutors have a more potential of perverting democratic processes via the politicisation of criminal justice, than common-law equivalents? This question must be answered necessarily, before addressing the main research question of this thesis – why prosecutors would display a certain variation of partisan behaviour under the institutional combination of a civil-law prosecution system and presidentialism?

Accordingly, the next section compares the institutional arrangements of common-law and civil-law prosecution systems, which have carefully preserved a balance between the rule of law and democracy by ensuring fair criminal proceedings in their own way. Only after this institutional difference is clarified, why civil-law prosecutors are frequently induced to take a partisan behaviour in criminal proceedings of major politicians under a presidential system, not under a consensus form of government, can also be explained.

2. 1. 2. Two types of prosecution systems

The institutional equilibrium of a common-law prosecution system

In common-law countries, an individual judge and prosecutor have enjoyed a more equal constitutional status with political authorities, dependent on the philosophy of liberalism, than in civil-law countries. Their insulated position is institutionalised via the judicial career system of this legal tradition (Kirchheimer 1961: 108). Most common-law judicial officers are selected, among prestigious lawyers, by their colleagues and are no longer strongly affected not only from elected politicians' external influence but also from their own superiors' regular evaluation within the bureaucratic career ladder. Hence, they are able to apply laws, relying on their own autonomy. Even the consistency of judgments or indictments is also preserved by continuously accumulated precedents, rather than by the organisational hierarchy of the judicial bodies (Mattei and Pes 2008: 269). Unquestionably, a common-law system allows judicial officers to enjoy a substantively high level of institutional security, in order to grant them autonomy to the degree that any external influence – such as a particular political faction or big business or even the state – has difficulty in buying them off (Larkins 1996: 608). Therefore, this legal system could be understood as an institutional arrangement to make judicial officers as non-partisan as possible for the establishment of the rule of law in the context of democracy.

This institutional configuration, albeit not always successful, has helped a judiciary to check the tyranny of a majoritarian government and to guarantee the rule of law generally in most common-law countries. Particularly in the U.S., while the political system is based on the separation of the three powers, the judiciary has obliged both the legislative and the executive branches to be horizontally accountable to the constitutional principle (Barnes 2004: 35-36). This contributes not only to the ‘checks and balances’ among the three branches in the Montesquieuian sense, but also to the realisation of the ideal designs in James Madison’s Federalist Paper no.47 and Alexander Hamilton’s no.78.

In common-law countries, however, the mechanism to encourage judicial officers to be accountable to democratic bodies was bound to become relatively weaker, which makes the judicialisation of politics a constant. For example, Cross (2008) is worried about the danger of the U.S. Judiciary lacking democratic accountability. Given that no statute of laws, especially of the constitution, can be interpreted by every judge in exactly the same way, there is a high probability that the judgments would be unfair and partial, if any constraint on them is absent. Realistically, even quite an autonomous judge cannot be completely non-partisan. Even if common-law judicial officers are restrained from seeking their self-interests as carefully as possible, the judicial mediation as a form of technocratic domination can appear.¹

In fact, some institutions work to induce judicial officers to have democratic accountability in part even in these legal countries. Obviously, a common-law system is unable to impose the vertical accountability on judicial officers, because elected politicians cannot have a continuous effect over their careers via the bureaucratic hierarchy. In the U.S., Canada, Australia, the political branches have an influence at least on the appointment of federal judges and prosecutors, but these processes are required just for a *priori* verification on their professional qualification and ideological inclination rather than for a continuous political control. In this respect, federal judges are even given a life-tenure job in the U.S. and Canada. In the U.S., on the other hand, the judges and prosecutors in many states are directly accountable to citizens as they have to be voted in popular elections, though the

¹ This problem is closely connected with Dahl’s concerns (1989: 65-82, 337-338) about guardianship. Even if Dahl does not deny the risk of the guardians’ individual and collective rent-seeking based on their self-interests, he also seems to worry more about the potential that technical experts as guardians may restrain democratic deliberation and distort democratic processes, adhering to their instrumental rationality, as Habermas (1972; 1984) warns. In this sense, the judicial officers’ technocratic decisions would also not necessarily serve the common good, even though they could hold independence as much as seeking no self-interest.

process can ironically permit judicial officers to enjoy the highest level of independence from the other branches of government, imposing accountability on them directly.

Meanwhile, a more notable point is that individual judges and prosecutors are allowed to exercise narrower jurisdiction, owing to the decentralised judicial procedures, in common-law countries than in civil-law ones. First, the judges and prosecutors cannot monopolise the interpretation of laws in issuing judgments and indictments, because they have to share the authorities of judicial decisions with petty and grand juries, respectively. Moreover, since most common-law countries introduced an adversarial system, the judges' status cannot overwhelm the lawyers' in civil trials, and the prosecutors' role is also restricted to the one of both sides in criminal trials (Friedman 1973: 134-137; Reichel 2005: 166-169).² In particular, common-law judges' decisions can be rather less arbitrary than civil-law ones' judgments, considering that the former must depend on the precedents in applying laws – albeit not in the early period when a number of precedents were produced (Gargarella 2004: 186).

In common-law countries, above all, prosecutors can be institutionally induced to conduct criminal proceedings as fairly as possible, because of the decentralised criminal justice system. Specifically, the prosecutors' power is constantly restricted by investigators, in particular police officers, who chiefly control investigations in pre-trial stages of criminal procedure (Hamilton 2008; Kyprianou 2008).³ In most common-law countries, such as the U.S., Canada and England, prosecutors hold neither the right to open and close criminal cases at their disposal, nor the power to control police officers during investigations, though they utilise plea bargains. The prosecutors generally decide the indictment or non-indictment over pre-investigated cases in the principle of *Opportunitätsprinzip*⁴ and even

² In common-law countries, particularly the U.S., therefore, the tendency of the judicialisation of politics led by private lawyers could be rather reinforced, which has also undermined the traditional form of a democratic process based on political mobilisation, by allowing them a considerable political influence (Crenson and Ginsberg 2004). In this regard, Epp (1998) identifies the 'support structure for legal mobilisation,' including rights advocacy lawyers, rights advocacy organisations, and sources of funding for litigation, as an important additional factor which contributes to the expansion of the judicialisation of politics, particularly in common-law countries.

³ In England, the police force held both the authorities to investigate and prosecute a criminal suspect, and hence they had been able to exercise dominant power over pre-trial criminal procedures before 1985. Until then, the British Police had worked in a similar institutional arrangement with a typical civil-law system, but was eventually reformed. By contrast, the Scottish Prosecution Service has long possessed both the powers to investigate and indict a criminal suspect, like in traditional civil-law countries.

⁴ *Opportunitätsprinzip* means the discretionary indictment system, in which prosecutors have discretion over whether a criminal suspect will be indicted or not for a trial. By contrast, in the mandatory indictment system, prosecutors have to indict a criminal suspect unconditionally when some necessary conditions are provided, although this principle could hardly curb the prosecutors' manipulative power from the combination of the investigation and indictment in a civil-law prosecution system, as explained below (Di Federico 1995: 237-

the authority to indict criminal suspects must be shared with the grand jury. When multiple agencies are enforced to monitor each other, the operational efficiency may be undermined in part but ‘checks and balances’ among them can be introduced (O’Donnell 1999: 41). In common-law countries, likewise, a decentralised criminal justice system can effectively guarantee a ‘due process’ for human rights, preventing the prosecutors or investigators from manipulating criminal proceedings, owing to the ‘checks and balances’ between the prosecution service and investigative agencies.⁵

Most of all, the institutional arrangement of a common-law prosecution system has an important implication in respect with the judicialisation of politics. In common-law countries, many individuals and groups, including politicians themselves, attempt to use criminal proceedings politically, owing to the relatively higher level of independence of judicial officers, but nobody can easily stigmatise his political enemies as criminal suspects, because he must form alliances with both the prosecution service and investigative force – which constantly keep each other in check – and further buy off the grand juries in order to fabricate the criminal proceedings. Moreover, the decentralised criminal procedure can protect information on the progress of investigations from a leak, and accordingly the media cannot recklessly report on mere suspected politicians. The principle of presumption of innocence would then not be damaged. Only special prosecutors can exercise both the powers to investigate and indict major politicians under suspicion, but even the criminal proceedings are unlikely to be distorted because the high-profile criminal cases are rare and attract the national attention. As a result, in common-law countries, prosecutors cannot make a too partisan influence in favour of any politician, even an incumbent president. This probability would be lower in the federalised countries, such as Canada and the U.S. where the organisational setup of law enforcement agencies is dispersed.

In short, in a common-law prosecution system, some crucial institutional elements have contributed to making judicial officers as non-partisan as possible, not only by ensuring their independence quite thoroughly, but also by reducing the necessity of external control over them through the prevention of their exerting arbitrary power in criminal proceedings.

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⁵ On the other hand, it can be criticised that the investigative officers could unfairly decide to cover up criminal cases during investigations, captured by any external influence, relying upon their main role of investigation in a common-law prosecution system. However, as various law enforcement agencies have the investigatory power in most common-law countries whereas the power to control investigative agencies is concentrated to the prosecution service in most civil-law countries, the improper termination of a criminal case can be considerably prevented due to the horizontal ‘checks and balances’ among the multiple agencies in the former countries.

In common-law countries, the judicialisation of politics *per se* may frequently arise as a democratic failure, given that more and more political and social forces are motivated not to mobilise a mass support but to use criminal proceedings against their political enemies (Crenson and Ginsberg 2004; Ginsberg and Shefter 2002). Nonetheless, the danger of the judicialisation of politics coming from the breakup of a balance between the rule of law and democracy can be minimised, due to the self-regulating institutional configuration of criminal justice system, in these legal countries.

The institutional equilibrium of a civil-law prosecution system

In traditional civil-law countries, the position of the judiciary was rather subordinate to the political authorities from the era of monarchy (Merryman 1985). In this regard, since the monarchism was replaced with democracy, the view that judicial officers must only be faithful servants for parliamentary authority has been dominant for a long time in the continental European countries. Accordingly, a bureaucratic hierarchy was also developed to control judicial officers in this legal tradition. To put it concretely, higher-ranking judges and prosecutors influence lower rankers' careers – recruiting, disciplinary proceedings, transfers, and promotion to an upper rank in particular – via their regular assessments, while political leadership has a decisive role in selecting the top-ranking officers, such as the supreme judges or prosecutor general (Ehrmann 1976: 76-78; Guarnieri 2003: 225-226; Shapiro 1981: 32). Considering that the salary, prestige and personal power of individual judges and prosecutors could be improved mostly through their career advancement in such a pyramid-like organisational setup, this institutional configuration, based on typical 'principal-agent model,' enables elected politicians to vertically check judicial officers and consequently to make them accountable to citizens indirectly.

Because of the vertical check on judicial officers, on the other hand, a civil-law system can allow them to exercise broader power than a common-law system. Although civil-law countries have steadily introduced a jury system, the inquisitorial system as a main feature of this legal tradition still guarantees the judges' comprehensive jurisdiction and dominant position in trials. According to Gargarella (2004: 186), in particular, civil-law judges can rather exercise broad discretion in applying statutes of laws for cases, because they rely much less on the accumulated precedents than common-law ones. Thus, if civil-law judges are not controlled appropriately in any way, they may seriously undermine the fairness of judicial processes, captured by particular interests.

In most civil-law countries, more importantly, prosecutors possess the right not only to investigate – mostly via the control of police and other investigative officers – but also to indict criminal suspects under the centralised criminal justice system, which enables them to exercise a wide power throughout all the pre-trial stages of criminal procedure (Di Federico 1995; 1998; Kyprianou 2008). The degree of wideness in the power varies among civil-law countries, depending on how closely prosecutors can dominate police officers or investigators of other law enforcement agencies during criminal investigations, but they are able to intervene almost freely at any point of a criminal proceeding. Undoubtedly, this centralised criminal justice system can contribute to the efficiency of criminal proceedings and establishment of public security.

However, as mentioned above, civil-law prosecutors could distort democratic processes, via the political manipulation of criminal proceedings, relying on their centralised power. Moreover, they may easily break the principle of presumption of innocence through their intentional leak of the progress of investigations to the press, while dominating the entire pre-trial stages of criminal proceedings. On the one side, civil-law prosecutors can use the press to construct a negative public opinion toward the suspected politicians by leaking information without any constraint. On the other side, the press can recklessly report on the politicians under investigation by assuming that they will eventually be prosecuted. As a result, civil-law prosecutors can fulfill their own interests via the politicisation of criminal justice, unless they are properly controlled by the organisational hierarchy in which elected politicians are at the top. The Italian and Brazilian Prosecution Services are such examples involved perilously in the judicialisation of politics through criminal proceedings.

Moreover, in several emerging democracies with a civil-law system, such as South Korea and Russia (up to 2007), prosecutors not only possess both the powers of investigation and indictment but also enjoy the monopolistic right to indict a criminal suspect, and even *Opportunitätsprinzip* (Lee 2007a; Mikhailovskaya 1999; Yoon 2009). As the prosecution services inherited most of its strong power bases even after the collapse of authoritarian and totalitarian regimes, they could still exercise extensive power over criminal procedure. In fact, these are also different from the cases of the continental European democracies with the civil-law tradition, in which prosecutors hold both the rights to investigate and indict criminal suspects, but the exclusive power to indict the suspects is somewhat curbed by several institutional elements. For example, the German Prosecution Service preserves a dually decentralised structure into federal and regional offices, as well as the mandatory

indictment system in contrast to the *Opportunitätsprinzip*. In France, prosecutors are necessarily required to transfer their investigative powers to the instructing judges in high-profile criminal cases,⁶ while they are given *Opportunitätsprinzip* as well as both the powers to investigate and indict criminal suspects. Also in Japan, primary investigations have to be led only by police officers in practice, and consequently prosecutors can just conduct supplementary investigations in most cases. This means that the balance between the rule of law and democracy, around criminal proceedings, is much more difficult to establish in the new democracies than in the other traditional civil-law countries, if the prosecutors' too extensive power over criminal procedure is not rationally controlled or adjusted. As this issue is directly connected to the main theme of this thesis, it will be examined more in detail in the following sections and chapters.

<Table 2-1> Comparison of Prosecution Systems in Various Countries

| Country Feature | U.S. | England | Germany | France | Japan | South Korea | Russia (up to 2007) |
|---|---------|---------|---------|---------|---------|-------------|---------------------|
| Power to terminate criminal investigations | X | X | O | O | △ | O | O |
| Power to control investigative officers | X | X | O | O | △ | O | O |
| Investigative force of its own | O | X | X | O | O | O | O |
| Exclusive right to indict criminal suspects | X | X | O | X | O | O | O |
| <i>Opportunitätsprinzip</i> | O | O | X | O | O | O | O |
| Organisational setup | Federal | Central | Federal | Central | Central | Central | Central |

Sources: Derived from Kim, Suh, Oh and Ha (2011: 146), and Mikhailovskaya (1999)

In numerous civil-law countries, fortunately, prosecutors are still accountable to the other branches of government, while judges have attained more independence than ever along with the global trend of judicial independence, as stated above. Then, the prosecutors may be predicted to have a difficulty in playing their original role of enforcing democratic bodies, especially the executive branch, to take horizontal accountability and consequently to protect minorities, owing to their weaker position compared to the political authorities. However, this institutional arrangement which helps elected politicians to influence the prosecutors' career promotion was never designed to make them responsible to a particular political faction, but to 'general' democratic authority covering as many political forces as

⁶ Although these 'powerful' instructing judges, who enjoy more independence from the political branches than the prosecutors, have occasionally been criticised for their partisan attitudes towards high-profile criminal cases, the accidents handled by them are precious few (Verrest 2000: 215).

possible. In principle, civil-law judicial officers have been responsible not to a majoritarian government, such as a current president, but to parliamentary authority participated in by all the political incumbents including even minority factions. Nor does this mean that this institutional arrangement would cause a cartel among politicians and therefore make the prosecutors daunted as excessively as they could not execute laws to punish even the politicians who committed a crime. Instead, the prosecutors can prevent a political majority from ruling tyrannically, while being prudentially aware of the minorities as well.

In sum, in traditional civil-law countries, judicial officers, currently the prosecutors, have been induced to be depoliticised via the suprapartisan influence based on a consensus government – which is elaborately explained in the next section –, whereas judges and prosecutors have been motivated to be non-partisan as much as possible, owing to their institutional independence from the political branches, in common-law countries. In other words, in a civil-law prosecution system, the institutional mechanism for political control over prosecutors is critical in ensuring the balance between the rule of law and democracy, given that they can exert enormously wide power over the centralised criminal procedure. After all, an important point is how the suprapartisan control over civil-law prosecutors could be institutionally generated, which depends on the variation of government form.

2. 2. Institutional harmony between a civil-law prosecution system and a consensus form of government

Although electoral branches indirectly impose democratic accountability on the civil-law judiciary and prosecution service through the hierarchical control, how ‘generally’ the elected politicians, who select top-ranking judges and prosecutors, cover political factions can make a significant difference in achieving the rule of law. Accordingly, the variation of form of government can have a critical effect on whether civil-law judicial officers would be motivated to apply laws in a politically neutral manner or not. This section explains the institutional mechanism to induce prosecutors to exercise their far-reaching power over criminal procedure fairly, under the institutional combination of a civil-law prosecution system and parliamentarism or dual executive system, in a theoretical level.

2. 2. 1. The institutional mechanisms for effective control over civil-law prosecutors in consensus forms of government

In civil-law countries, elected politicians can democratically control judicial officers to a certain degree, protecting them from particular political and economic snares, as long as the organisational hierarchy is preserved in a bureaucratic way. The high salary, prestige and personal power granted only to a few number of high-ranking judicial officers are always attractive rewards for low-ranking judges or prosecutors, and consequently they cannot help but aim to obtain these posts as one of their most important goals. In a civil-law system, judicial officers' seniority and professional performance are adopted as the objective criteria for their advancement on the bureaucratic career ladder, while elected politicians make a final decision on the appointment of top-ranking judges and prosecutors, which could give them a strong incentive to accumulate the professional merits, and at the same time, to apply laws with accountability, for their career development.

As already discussed briefly, however, the judicial officers must be motivated not to have loyalty to only a part of elected politicians but to political authorities as inclusively as possible. Specifically, if civil-law prosecutors who are able to exercise extensive power in criminal proceedings are not carefully prevented from taking a partisan position, they may be metamorphosed into an even more dangerous political weapon than the judges. If so, this means that the rule of law tends to be achieved, under a consensus democracy than a majoritarian one, and under a parliamentary democracy than a presidential one, in civil-law countries.

Then, according to the conceptual classification of Lijphart (1994; 1999), a majoritarian democracy is not necessarily a presidential one, while a consensus democracy is also not essentially a parliamentary one. But he clearly thinks that a presidential system has more potential to result in majoritarian democracy (Lijphart 1994: 93). Though an incumbent president can form and manage the executive *de facto* autonomously as the chief of the branch founded on majoritarian legitimacy, he also cannot help but cooperate with the legislature for a well-functioning government. In a presidential system, nonetheless, the president's personal decision over the formation of an executive is more likely than his concession of it to the legislature, because the two democratic bodies can hardly remove each other during a fixed period (Stepan and Skach 2003: 18-20). Although some scholars have recently argued that consensus governments could be composed also in presidential

countries (Cheibub, Przeworski and Saiegh 2004; Negretto 2006), the president's influence over the selection of high-ranking officials, including judicial officers, is much stronger than any other coalition partner. By contrast, even in a majoritarian parliamentary system, the prime minister cannot hold a monopoly of the appointment power over the cabinet, let alone law enforcement agencies or the judiciary. Hence, as discussed below, a majoritarian parliamentary system can also be recognised as a consensus form of government, regarding its appointment power, to a certain degree.

In consensus democracies, a prime minister usually has to respect the collegial decision-making process and share ministerial-level posts with other leaders of the ruling party or other parties (Heywood 1997: 324-325; Linz 1994: 31-32). Therefore, he cannot help but concede his stake also in choosing top-ranking prosecutors. Empirically, in consensual parliamentary countries with a civil-law tradition, a suprapartisan coalition – even embracing the left and right together – has been required for selecting the top-ranking judicial officers (Ferejohn, Rosenbluth and Shipan 2007: 734), although judges obtained more independence from the political branches than ever, along with the recent global tendency. For example, in the continental European countries, such as Austria, Germany and Italy, the constitutional court could be composed of comparatively depoliticised figures from the beginning, because the suprapartisan approval of the parliament has been required for appointing the members (Cole 1959: 969). Hence, suprapartisan control could repress the politicisation of criminal justice as well, forming an incentive structure for civil-law prosecutors to exercise their great power as impartially as possible, given that a coalition government has a decisive effect on their careers, in these countries. After all, it also seems no accident that most of the continental European countries with a civil-law tradition, such as Germany, Austria and the Netherlands, not only adopted an electoral system based on the practice of consensus among different parties, but have also determinedly ensured parliamentary supremacy for their long histories.

In countries with a dual executive system, such as France,⁷ where an incumbent president and prime minister sometimes share the authority to dominate the executive branch, the political leadership could not be subject to a particular political faction, but would rather accommodate the consensus between various political parties or factions (Blondel 1992). Also under this form of government, civil-law prosecutors can be induced to relatively impartially exercise their far-reaching power over criminal procedure. Apart from the

⁷ About the dual executive system (semi-presidentialism) of France, see Elgie (1999).

unusual cases where an incumbent president not only belongs to the majority party but also gains command of the party, like in France under Charles de Gaulle, a particular faction cannot make an exclusive decision on the career promotion of prosecutors, not to mention the appointment of top rankers. On the other hand, as the Westminster model is a kind of parliamentary system, the prime minister also cannot help but cooperate, at least with other leaders of the ruling party, in forming the executive branch, while Horowitz (1990: 73-79) criticises the ‘winner takes all’ feature of this model. Furthermore, even in the Westminster model, a majority cabinet cannot make an exclusive decision on important political or policy issues beyond the practice of consensus between different parties in the parliament (Dahl 1989: 157). This is why political affairs such as ‘Watergate’ have seldom occurred in countries with any form of parliamentary system (Lijphart 1992: 14-15). Hence, the prime minister’s faction cannot easily make a monopoly of the prosecutor’s offices as well, though the cabinet cannot be induced to hold a suprapartisan manner as much as in other forms of consensus government. As a result, the possibility that civil-law prosecutors form an alliance with a particular political faction and distort criminal justice would be much lowered under a dual executive or a parliamentary system, even including the Westminster model, than under a presidential system wherein an incumbent president holds the supreme authority.

Under parliamentarism, meanwhile, the official tenure of executive leadership is not fixed but flexible – though this feature would have both advantages and disadvantages –, since the composition of a cabinet can change when the parliament is dissolved, regardless of regular elections, or a shift of power occurs within a coalition government (Linz 1994: 9; Strøm 2000: 274). If the executive leadership which has a decisive effect on judicial careers is unpredictably replaced, civil-law prosecutors cannot seek their career promotion by devoting loyalty to a particular political faction in stable-term perspective. Instead, due to this uncertainty of the time factor, they can be motivated to exercise their extensive power politically impartially. Ferejohn, Rosenbluth and Shipan (2007: 746) point out that a judiciary can review the constitutionality of legislations freely from a partisan influence, right after a national election, because it cannot exactly predict which political parties and factions will compose the new coalition government. Then, the judiciary would be led not simply to be independent but impartial on account of the *ex ante* uncertainty. However, as a consensual parliamentary government includes the *ex ante* uncertainty as a constant, not just at the time after elections, it could be more appropriate to say that the judicial officers can usually be induced to hold a suprapartisan manner. Therefore, a civil-law prosecution

service, in which elected politicians still choose top-ranking prosecutors, could be induced to exercise the far-reaching power more fairly in criminal proceedings, because of the uncertainty of the time factor, when compared with the courts which have recently gained more independence from the political branches.

The Westminster model is not so different from the other parliamentary systems in the respect that it shares the essential features of parliamentarism, such as the potential for changes in the composition of executive leadership, regardless of regular elections. Even the composition of the Japanese Cabinet has perpetually reshuffled under the long Liberal Democratic Party regime. Likewise, in a dual executive system, as which political parties or factions will gain a share of the initiative to compose the executive can unpredictably change, because of the different timing of presidential and parliamentary elections, civil-law prosecutors who belong to the executive leadership also have difficulty in pursuing their career promotion by demonstrating loyalty to a particular faction.

In sum, civil-law prosecutors would have more incentives to gain career advancement by satisfying the objective criteria, such as seniority and professional performance, than by devoting loyalty to a particular political party or faction, in parliamentary or dual executive systems that entail the pattern of consensus democracy, due to the practice of suprapartisan consensus and the flexible tenure of executive leadership. As expected, not only in the mature consensus democracies, but also in the emerging ones such as the Czech Republic, civil-law prosecutors have been comparatively prevented from manipulating criminal proceedings politically (The World Justice Project 2012-3). A possibility that individual civil-law prosecutors would be captured by external influences cannot be totally denied, but the prosecution service as a whole is unlikely to assume a partisan position in thrall to particular interests, given the strong organisational hierarchy among the prosecutors. In other words, despite the civil-law prosecutors' far-reaching power, the institutional factors of consensus forms of government can induce them to exert their power against suspected politicians, in a depoliticised manner as far as possible, in criminal proceedings. As a result, the politicisation of criminal justice would be significantly prevented. Then, every political faction would humbly accept the prosecutors' decisions with no doubt on their partisan bias and therefore the political majorities could also be restrained from ruling tyrannically.

2. 2. 2. The importance of stable executive leadership under consensus forms of government

Both the well-functioning parliamentary and dual executive systems are founded on the institutional cooperation between various parties and factions, but the principle of ‘checks and balances’ – which allows no party to monopolise all the executive power – is also obviously embedded beneath the suprapartisan consensus that sustains a coalition or a cohabitation government. This is why a certain political faction can neither hold exclusive control over civil-law prosecutors’ careers, nor judicialise politics via criminal proceedings only in favour of itself by abusing their extensive power. However, on the other side, in order that elected politicians can democratically control the prosecutor’s offices and guard the criminal justice under the consensus forms of government, these government types are first of all required to work stably.

A consensual parliamentary system has not only the advantage of suprapartisan governance, but also the disadvantage of unstable executive leadership, on account of the power sharing among various political factions. From a different angle, the flexibility of irregular cabinet changes may mean the instability of executive leadership (Jin 2004: 374). A dual executive system is not so different. The problem is that the risk of collapse of democratic regimes would be higher under consensus forms of government than under a presidential system, owing to a potential of the instability. All the rises of extreme parties such as the Nazis in the Weimar Republic, the military *coup* in South Korea, and the 1993 constitutional crisis in Russia in fact resulted from a failure in power sharing under the parliamentary or dual executive system. If a consensus democratic regime is in a crisis or a collapse as in the above cases, the prosecution service, which would have maintained its political neutrality because of the consensus forms of government, can no longer have merit.

Above all, in both parliamentary and dual executive systems, a democratic regime is likely to be in crisis, if the fragmentation of the party system or a conflict between the parties becomes so serious that the executive branch itself cannot be composed (Lepsius 1978; Lijphart 1994: 100; Sartori 1997: 128-129; Skach 2005: 17-18). In addition, unless the power distribution between an incumbent president and prime minister is clearly defined in the dual executive system, democracy itself would face a danger (Linz 1994: 55; Linz and Stepan 1996: 286). The so-called ‘president-parliamentary’ system, wherein the president and parliament share the right to dismiss the prime minister and his cabinet, also entails a

potential of the instability of executive leadership, due to the conflict between the multiple authorities, as an essential peril of consensus forms of government (Shugart 1993; Shugart and Carey 1992).⁸

In this connection, Linz (1994: 57-59) argues that the military would be in a quandary as to whether it should obey a hierarchical order from an incumbent president or prime minister, which often could cause a democratic failure under a dual executive system. Specifically, one of the two chief executives may attempt to suppress another, in the vortex of the power struggle between them, by embracing a part or whole of the military, although the latter case is infrequent. For example, some generals, dissatisfied with their current position and influence within the military, may form an alliance with a particular political faction and stage an armed revolt. Otherwise, the military as a unitary actor may regard the power struggle between a president and prime minister as a democratic failure and try to come to power for itself, though it can occur also under a pure presidential system. This is why the Second Republic of South Korea was overthrown by Jung-hee Park's military *coup* in 1961 (Han 1974; Kang 2009). Despite the fact that Linz (1994) clearly reveals his preference for parliamentarism over presidentialism by involving this strategic behaviour of the military only in the dual executive system, such incidents can happen also under the consensual parliamentary system. On the one hand, the collapse of the Second Republic of South Korea could be considered the failure of a dual executive system, given that the serious conflict between the president and prime minister was one of the main reasons for the military *coup*. On the other hand, it was obviously regarded also as the failure of a parliamentary system, since the military could gain an opportunity to intervene in politics while the parliament repeatedly failed to compose a stable cabinet.⁹

⁸ According to Elgie (2007), the 'president-parliamentary' system would be a more dangerous subtype of dual executive system to democratic regimes, than the French 'premier-presidential' one in which the prime minister and cabinet are formally accountable exclusively to the parliamentary majority, not to the president.

⁹ Here, it is required to point out that most of the Latin American countries in which the military has often mounted a *coup* hold a presidential system. In particular, the militaries used to seize an opportunity to intervene when a conflict between the executive and legislative branches became violent. This means that a military could not constrain itself to take its natural obligation and might have an ambition to dominate the state for itself, even though the organisation is placed on the single hierarchy from a president. Linz (1994) believes that there would be the highest possibility of a military *coup* in a dual executive system, but he never argues that a presidential system could prevent the military from mounting a *coup* better than a parliamentary one. Carey (2005: 104-105) also assumes that presidentialism has not a low potential to cause a military *coup* when the deadlock occurs between the two democratic bodies, and ironically, the possibility of a military *coup* could become higher in a presidential system when the president's law-making power is strengthened to resolve the stalemate unilaterally. However, as mentioned previously, the failure in forming the executive branch seldom emerges under presidentialism. Hence, the instability of executive leadership *per se* can be prevented, although the deadlock cannot easily be avoided. In this context, the argument that the military or opposition forces have to pay more costs in overthrowing the executive in a presidential system than in a parliamentary one (Mainwaring and Shugart 1997: 452-453), and that parliamentarism is more vulnerable to

Naturally, the military and judicial bodies would face different incentive structures in their interaction with elected politicians. Military generals can initiate to defeat a democratic regime, allying with a certain political faction and take part in the ultimate power of new rising authoritarian regime. Otherwise, they can make the new regime a puppet one and attempt to establish an actual military government, depending on their material force. In contrast, the prosecution service can never have such an option for the military, because judicial officers' power base is strictly legally institutionalised (Sánchez-Cuenca 2003: 80-81). Since even civil-law prosecutors who exert centralised power in criminal proceedings cannot hold the material force usable for the collapse of a democratic regime, unlike the military, they are unlikely to recklessly support any one side, when a conflict among political factions becomes serious in a parliamentary or dual executive country. However, at the phase wherein a political faction or the military force succeeds in overthrowing a democratic regime and establishing an authoritarian domination, the political incentive structure for the prosecutors cannot help but change, because the target to devote their loyalty will become increasingly apparent. As the prosecutors realise that their career development would no longer be influenced from the consensus among existing political parties or factions, they would actively contribute to the settlement of undemocratic regime, by stigmatising the old politicians as criminals and destroying their democratic legitimacy, through their far-reaching power over criminal procedure. That is, if civil-law prosecutors are convinced that a democratic regime would collapse and a new authoritarian one would come to power, they could resolutely manipulate criminal proceedings politically in favour of the *coup d'état*.¹⁰

Therefore, in the countries where a parliamentary or dual executive system was adopted, some conditions are necessary to preserve the stability of these forms of government, for the purpose of appropriate control over a civil-law prosecution service. For instance, a parliamentary system requires a few essential conditions to work well, such as political parties with strong discipline and cohesiveness, or an unfragmented party system (Sartori

a military *coup* could be suggested (Blondel 1992: 171). It was even empirically confirmed that the executive can survive more stably under presidentialism than under parliamentarism (Powell, Jr. 1982: 133-153). These two contrasting outcomes of existing researches show whether a presidential or parliamentary system would be more vulnerable to a military *coup* is still debatable. In addition, there have been many other studies about the influence of each form of government on the collapse of democracy (Elgie 2010; Power and Gasiorowski 1997; Przeworski, Alvarez, Cheibub and Limongi 1996; Shugart and Carey 1992; Stepan and Skach 1993; Valenzuela 1994). However, I stop discussing this issue here, because it is outside the scope of this thesis.

¹⁰ In Chile, the judiciary voluntarily chose to demonstrate loyalty to Augusto Pinochet and his military junta when he staged the 1973 *coup*, although the military revolt emerged neither under a parliamentary nor dual executive system, but under the presidential system (Valenzuela 1989: 190).

1994: 112). In addition to these conditions, a dual executive system is required to hold a clearly defined rule or practice for the power sharing between the president and prime minister, in preparation for the affair in which different parties occupy the presidency and parliament, respectively.¹¹ Furthermore, to adopt the ‘constructive vote of no-confidence’ used in German, Belgium, Spain and so on, can be an additional measure for sustaining a stable executive branch and securing the democratic regime (Gallagher, Laver and Mair 2001: 72; Lijphart 1999: 304). If these conditions were absent, consensus forms of government would increase the risk of democratic collapse and consequently offset the advantage of politically neutral judicial bodies, particularly the prosecution service, which could have been guaranteed in a stable parliamentary or dual executive system. Even if these political systems could induce civil-law prosecutors to exercise their broad power over criminal procedure impartially and be less involved in the politicisation of criminal justice once, this institutional arrangement to ensure their political neutrality would no longer have the advantage from the time when undemocratic forces begin destroying the consensus democracies.

2. 3. Institutional disharmony between a civil-law prosecution system and presidentialism

If a civil-law prosecution system is combined with a majoritarian democracy, in particular a presidential one, the prosecutors would distort democratic processes, by manipulating criminal proceedings in support of an incumbent president, unlike under a consensual parliamentary or dual executive system. That is, civil-law prosecutors would be misused unilaterally as the president’s political instrument for the politicisation of criminal justice. Especially in some new democratic countries, civil-law prosecutors inherited greater power from past authoritarian or totalitarian regimes, than in the traditional continental European countries. Therefore, they have a potential to metamorphose themselves into a much more destructive weapon. As discussed above, however, the fact that civil-law prosecutors have seldom displayed partisan behaviour in the continental European countries can confirm that they would not necessarily be misused as a political weapon, despite their extensive

¹¹ According to Duverger (1980: 185), even the most successful French dual executive system cannot be a mixture of presidentialism and parliamentarism, but merely changes itself either into the former or the latter. This implies that a dual executive system cannot be sustained, if the president does not concede a substantial part of his power to the prime minister when the party the president belongs to is not the majority one within the parliament.

power over criminal procedure. If they are appropriately controlled, their far-reaching power itself cannot be regarded as a sufficient condition to make them a political weapon. Rather, why prosecutors could not help but get politicised and aggravate the judicialisation of politics through criminal proceedings could be attributed to the discordant institutional combination of a civil-law prosecution system and presidentialism. This section explores these dynamics as the main framework of this empirical study.

2. 3. 1. Institutional preconditions for the politicisation of criminal justice in new democracies

A prosecution system with the legacy of a strong civil-law tradition

In several young democracies, such as South Korea and Russia (up to 2007), prosecutors can exercise even broader power, in criminal proceedings, than those in any other civil-law countries. Moreover, the prosecutor's offices inherited a more centralised organisational structure than those of the continental European countries. This is because authoritarian dictators or communist parties created such a prosecution service which could not easily be captured by other political and business influences, while securing their exclusive control over the power agency for the sake of their purpose (Blank 2008; Chen 2004; Lee 2007a). Therefore, the undemocratic regimes could effectively destroy anti-regime resistances and remove their political enemies in advance, in the name of social order or the rule of law, by relying on the prosecution system.

The problem is that the civil-law prosecutors have enjoyed their far-reaching power over criminal procedure as a prerogative, even since democratisation. As the prosecutors not only hold the powers to investigate and indict a criminal suspect, like other civil-law ones but are also given *Opportunitätsprinzip*, they are able to *de facto* dominate a criminal proceeding, at least in the pre-trial stages, without 'checks and balances' from other state bodies (Mikhailovskaya 1999; Yoon 2009). Penetrated by a particular political faction or business influence, the prosecutors can easily manipulate criminal proceedings in favour of them. Thus, especially concerning the politicisation of criminal justice, if any politician forms an alliance with them, he would be able to stigmatise his political opponents as criminal suspects and tactically exclude them from democratic processes at little cost on himself. This means that the civil-law prosecutors exercise too much transitional power and hence may be metamorphosed into a dangerous political weapon against democratic processes 'path dependently,' in the situation where these young democracies have not yet

reached the consolidation of democracy.

In the new democracies, moreover, the prosecution service inherited an organisational hierarchy with a unified and centralised structure. Even since democratisation, both the principle of a single prosecution service and the custom that obliges the prosecutors to obey their superiors' commands are still sustained firmly. On the one hand, a strong organisational hierarchy would contribute to the consistency among their decisions and the prevention of their individual rent-seeking. On the other hand, however, it would motivate them to be excessively subject to the collective ideas or interests of their own organisation. That is to say, there is a risk that the majority of the prosecutors may be misused as a threatening political weapon, depending on the top rankers' partisan position.

However, a normative principle or custom cannot necessarily help an organisation to preserve its solid hierarchy. The principle of a single prosecution service and the practice that enforces prosecutors to observe their superiors' command can somewhat contribute to the hierarchy between the high and low rankers, but the intensity of their organisational hierarchy is rather variable, depending on the degree of bureaucratic systemisation based on the legally-formal and impersonal rationality the organisation accompanies. Indeed, an organisation can prevent its members from being fragmented into various factions or being captured by any external influence, when their career promotion is thoroughly based on seniority and merit system (Evans 1995; Schneider 1993). In this regard, there could be a considerable difference in the bureaucratic systemisation among emerging democracies (Linz and Stepan 1996: 55-65). For instance, a post-authoritarian state bureaucracy tends to preserve relatively well-qualified bureaucratic systemisation, and therefore to hold a solid organisational hierarchy, though personnel lustration is required at least partly. In contrast, a post-totalitarian state bureaucracy may entail the previous personal and patron-client networks in the undemocratic period, which can substantively undermine its bureaucratic systemisation and consequently hold a relatively weaker organisational hierarchy.

If a post-authoritarian prosecution service preserves the legally-formal and impersonal rationality in its career system, its organisational hierarchy can also be strong. The then prosecutors would be induced not only to accrue seniority but also to make a commitment to the goals targeted by their organisation, rather than to seek corrupt rents or join in any self-interested faction, as higher rankers' quite professional assessment of lower rankers' performance could ensure the stability of career prospect for them. This is not so much

different from the judicial career system in traditional civil-law countries. Thus, a post-authoritarian prosecution service can also be supposed to actually behave as an almost unitary actor, like the traditional civil-law ones. However, if top-ranking prosecutors are not placed under a suprapartisan political pressure but hold a partisan position in favour of a particular political faction, such as the presidential one, a firm organisational hierarchy can rather make the prosecution service display a unified partisan behaviour. That is, even low-ranking prosecutors will unconsciously support the top rankers' partisan decisions, while faithfully carrying out orders from their immediate superiors.

On the other hand, if a post-totalitarian prosecution service was infected by the patron-clientelism, like the other bureaucrats of this regime type, the prosecutors would behave differently from those of post-authoritarian countries. In the totalitarian period, state officials' career development did not much depend on their seniors' professional evaluation but decisively on the party-cadres' personal assessment (Hough 1969: 289-300; Voslenskii 1984: 75-81). Moreover, since high-ranking state positions have guaranteed less benefit, because of the Soviet systematic difficulties, the state officials tended to concentrate more on the acquisition of private property than on elevation to higher ranks (Kryshtanovskaya and White 1996: 716). Hence, bureaucratic systemisation was replaced with patron-client networks, and the state bureaucracy could not help being vulnerable to factional conflicts and serious corruption. Given that prosecutors had massive power, they could also not be totally free from this tendency, in this period. Therefore, it could also be assumed that the organisational hierarchy of a post-totalitarian prosecution service would be weaker than that of a post-authoritarian one. Even the official rules for its organisational hierarchy or cohesiveness cannot be observed so well.

Still, it may be improper to overemphasise the difference in the organisational hierarchy between a post-authoritarian and a post-totalitarian prosecution service, considering the intrinsically strong hierarchy of this power apparatus. Nevertheless, a post-totalitarian prosecution service clearly tends to entail more fragile bureaucratic systemisation and bring more factional conflicts within the organisation, than a post-authoritarian one.¹² As a

¹² Strictly speaking, the then organisational hierarchy means not the relations among top-ranking prosecutors, but those between higher-ranking and lower-ranking prosecutors. Though there is precedence among the top-ranking prosecutors and the prosecutor general intervenes partly in choosing other top rankers, the hierarchy among the top-ranking prosecutors is closer to a formal than a substantive one, considering that all they are appointed on basis of political reasons as well as of their work experiences. The prosecutor general is only slightly higher than among approximately equal leaders. Even though an organisation holds an organisational hierarchy based on the rational career promotion scheme, such as seniority and merit system, it is not at all surprising that factionalisation in it cannot be perfectly avoided, as long as elected politicians exercise the

consequence, on the one hand, the prosecutors can have an incentive to seek corrupt rents by serving their internal or external patrons. On the other hand, however, a post-totalitarian prosecution service may be prevented from holding a unified partisan position, due to its weaker organisational hierarchy than that of a post-authoritarian one.

A presidency with the exclusive power over executive leadership and state bureaucrats

One of the most important features of a pure presidential system is that an incumbent president alone can compose the executive branch autonomously from the legislature, on account of the practice of ‘winner takes all’ (Lijphart 1991; 73-74; Linz 1990: 52). Unlike in a parliamentary system, where the prime minister has to respect other parties or other leaders of the ruling party in composing the executive leadership, the president usually exercises decisive authority in presidential systems.

Even in a presidential system, the legislature can exert a *priori* and a *posteriori* influence on formation of the executive branch. The legislative branch sometimes has at least the right to approve the candidate for the position of prime minister, and occasionally rejects the nomination, though this is infrequent. In particular, the presidential power to compose the executive branch can be somewhat undermined by the legislature in the circumstance of a divided government. Nevertheless, it is hard to say that the president’s exclusive power to form the executive would be *ex ante* constrained substantially by the legislative branch. The president can repeatedly nominate candidates whom he prefers, and the threshold of rejection imposed on the legislature is quite high, for example, requiring a supermajority and so forth (Carey 2005: 95-97). This is why a presidential system is different from the other government forms, in which the president has to hand over the power to compose the executive to opposition parties totally or take a mid-term assessment by dissolving the parliament, when the opposition parties obtain the majority of seats. Moreover, in many presidential systems, ministers or other important executive appointees answer only to the president *ex post* (Shugart and Carey 1992: 106-111). Except for the president, the other branches of government can seldom have a decisive effect on the dismissal of high-ranking executive officials. Thus, an incumbent president can manage the executive branch autonomously from the legislature, after the branch is once formed, despite few *a priori* constraints from the legislature.

right to choose top rankers. Nonetheless, an organisation, which entails the bureaucratic systemisation based on legally-formal and impersonal rationality, will not weaken its hierarchy or cohesiveness as severely as the others that accompany personal and particularistic networks based on patron-client ties.

Even in the U.S. presidential system where the president has to acquire a *priori* consent from the Senate in appointing several high-ranking state officials, the legislative branch cannot be considered to share the real power with him in composing the cabinet. In any case, U.S. Presidents are able to exercise their initiative in nominating his own ministerial candidates, and the ministers are responsible only to him after their appointment. Moreover, in some new democracies, such as South Korea and Russia, a president's exclusive power to compose the executive branch is *ex ante* checked much less than in the U.S. (Park 2004: 90; White 2011: 76). In most of the emerging democracies, the legislature might possess only the right to confirm the prime minister but would not often exercise even this power.

However, a more critical point about the management of the executive branch is that the high-ranking occupants of this branch, including ministers, have frequently been selected through advancements on the bureaucratic career ladder. In the U.S., this pattern has been infrequent owing to the long tradition of the 'spoils system' (Riggs 1994: 67-68), whereas in some new democracies, ministers and ministerial-level appointees have been chosen among career bureaucrats by an incumbent president (Kang 2001: 7-10). The advancement of career officials to the chief posts of ministries can be practically required to encourage the competitiveness in their professional knowledge and administrative capacity, and to boost their morale. Yet, if an incumbent president can control even the bureaucrats' career and future, it is hard to remove the probability that even the administration, which ought to become as politically neutral as possible, would devote private loyalty to one person, the president.

In particular, considering the president's fixed tenure as one of the main characteristics of presidentialism, the bureaucrats would get more politicised by the custom of ministerial appointments through the bureaucratic career ladder, than through the 'spoils system.'¹³ Unlike in a parliamentary system where the legislature and disciplined parties collegially control the state bureaucracy, the president can exclusively dominate it during his fixed tenure. As long as senior bureaucrats, including the prosecutors, perceive that the chief

¹³ According to Riggs (1994: 66), ironically, in the U.S. state officials have not been seriously politicised, despite the tradition of the 'spoils system.' He perceives that the officials could get less politicised because of their narrower power, than those of other countries, although the former may have a stronger ideological inclination than the latter. In other words, in the U.S., bureaucrats are not completely depoliticised but cannot arbitrarily carry out administrative tasks with a partisan manner. This is also applied exactly to the U.S. Prosecution Service, as noted earlier. In the U.S., prosecutors cannot easily manipulate criminal proceedings even in favour of a current president, since they are able to exercise narrower power over criminal procedure than civil-law prosecutors.

executive, who has a decisive influence on their long-term career development, does not change during the fixed time, they cannot help having an incentive to serve his preference at any rate. Therefore, this mechanism would not only allow the president administrative manoeuvres, but also deepen corruptions involving him and his close allies.

Then, as stated above, even under the same condition that the bureaucrats' loyalty to an incumbent president has a decisive effect on their promotion to ministerial-level posts, there can be differences in the extent that bureaucratic systemisation is employed in the career system, and consequently the degree of the organisational hierarchy or cohesiveness can vary among countries. In particular, a post-authoritarian prosecution service preserves a stronger organisational hierarchy than a post-totalitarian one, because of the same reason. As a consequence, a post-authoritarian prosecution service would successfully work for an incumbent president's partisan goals with a unified manner, if he simply chooses his loyalists for the top-ranking positions. By contrast, a post-totalitarian prosecution service could not so effectively carry out an incumbent president's partisan initiatives, let alone its ordinary works, owing to the fragmentation and factional conflicts within the organisation, even though the president still enjoys a more certain advantage, in abusing the prosecutors' enormous power, than any other political actors.

2. 3. 2. A civil-law prosecution system, presidentialism and the politicisation of criminal Justice: the main framework of research

The politicisation of criminal justice: political competition and the president's short-term interest in exploiting civil-law prosecutors

In new democracies, political competition which had long been coercively and ideationally suppressed by an authoritarian or totalitarian regime was bound to emerge. In fact, there could be more factors of a severe political competition, such as nationalism, regionalism, ideological conflicts, quarrels over the direction of regime transformation, and so forth in the countries than in developed democracies. Moreover, the zero-sum feature, caused by the 'winner takes all' of presidentialism, *per se* could make strong political oppositions against an incumbent president (Linz 1990: 56; Sartori 1994: 108-109; Shugart and Carey 1992: 31). Especially, the probability that a divided government emerges would also be high, when a multiparty system is constructed (Mainwaring 1993) or the time difference between presidential and legislative elections is long (Shugart 1995). In a number of new presidential democracies, hence, the factors of political competition could intensify the

political conflicts, caused frequently in the political system itself, and even bring a political polarisation.

Here, we need to pay more attention to that the deepened political competition can make both the ruling and opposing politicians vulnerable to the judicialisation of politics via criminal proceedings. Productive political disputes would cease and a political faction's loss of moral foundation would be most advantageous to another in the circumstance of an extreme political polarisation.¹⁴ Then, if an incumbent president exploits the far-reaching power and the strong organisational hierarchy of a civil-law prosecution service, he can easily overlay his political oppositions with the image of criminal suspects and bring down the public trust for them under the pretext of the rule of law. Moreover, the president can tactically repress particular businesses, social organisations, and media, relying on this political weapon. This one-sided politicisation of criminal justice is able not only to make a political situation beneficial for the president by distorting democratic processes such as national elections, but also to form a configuration of social norms significantly favourable for him within civil society.

Apart from an effective value from the alliance with civil-law prosecutors in the aspect of sword for attacking political enemies, the alliance could be useful also as a shield for defending the president and his faction. In many new democratic countries, where a broad-scale privatisation was carried out as a part of economic reform or the state still intervenes in the distribution of financial resources, the quarrel over corrupt links between politics and business has not ceased. This is because the executive leadership and senior bureaucrats have a decisive effect on the process through which national socioeconomic resources are distributed (Kaufman and Siegelbaum 1997; Lim 2009; Rutland 2001: 24-25). Therefore, it seems natural that not only an incumbent president, who has the ultimate power to control the executive branch, but even his inner-circle or family members are often involved in corruption (Chang, Park and Yoo 1998: 739-741; Fish 2000: 189; Weyland 1998: 111).

¹⁴ A counterargument that in the U.S., serious conflicts between a president and legislature have not arisen, in spite of presidentialism, could be suggested (Mayhew 1991). However, it has been possible because of a few unique factors in the U.S. politics. According to Sartori (1997: 89), these factors include ideological flexibility, weak and undisciplined parties, and locality-centered politics. Moreover, the stable party system has been able to raise a potential of the cooperation between the two democratic bodies, despite the weak and undisciplined parties. On the other hand, the U.S. Presidents' consistent persuasion *vis-à-vis* the legislature is another factor to encourage their cooperation (Neustadt 1976: 10). After all, these exceptional factors have contributed to alleviating the zero-sum feature of presidentialism in the U.S. Nonetheless, these factors can only moderate the zero-sum feature, but cannot totally ensure the consensuses between the president and legislature in the governing processes. As explained previously, also in the U.S., the judicialisation of politics has often appeared, but its dangerousness could be less than in other new presidential democracies with a civil-law system, due to the self-regulating institutional arrangement of the common-law tradition.

Nonetheless, given that civil-law prosecutors can selectively open a criminal case from the first but also – when the case is already opened – can terminate the case without indictment of the suspects at their discretion, a lot of criminal cases involving the president and his close allies will be given immunity, not turning into a critical political issue, if a president can gain loyalty from the prosecutors.

Then, an important point is that if an incumbent president seeks his short-term interest in abusing the civil-law prosecutors' extensive power, the high rankers who wish to fulfill their individual interest through career promotion to the top-ranking posts – such as the prosecutor general, the deputy prosecutor general, the chief of a provincial prosecutor's office, etc. – would be induced to devote loyalty only to him.¹⁵ A prosecutor general and the other top-ranking prosecutors, who have a relatively weaker incentive to get promoted to upper ranks, may be predicted to remain politically neutral, and even to initiate criminal proceedings against the president and his close allies if required. This is why, in several countries, the constitution fixes the tenure of prosecutor general or prohibits his dismissal without the approval of the legislature. Nevertheless, if the incumbent president has a long reminder of his official tenure, most of the prosecutors general would keep their loyalty with the expectation that they will obtain the other high-level state posts such as the minister of justice or at least sustain their current position. Nor is there a high probability that other top-ranking prosecutors who await the chance to become the next prosecutor general, and seniors who wish to get advanced to a top-ranking post, would betray the president but follow the current prosecutor general, considering that the hierarchy between top rankers would be formal rather than substantive and the president would be the “real” appointer. Thus, it could be concluded that the guarantee of relatively short tenure for the prosecutor general alone can neither eradicate the improper alliance between an incumbent president and civil-law prosecutors, nor motivate the latter to remain politically impartial, since the prosecutor general who can foresee the other prosecutors' strategic choice is also likely to abandon betraying the president. Furthermore, the low and middle rankers who usually ought to be under their superiors' professional evaluation in the firm organisational hierarchy – although the evaluations are taken mainly according to objective standards – would also serve the incumbent president, albeit unintentionally.

Then, as discussed before, a civil-law prosecution service is generally based on a strong

¹⁵ The long-term interest a president would have in relations with the prosecution service will be explained again in the next subsection.

organisational hierarchy, but there may be a little difference in the degree of bureaucratic systemisation between a post-authoritarian and a post-totalitarian prosecution service. Whether an incumbent president can dominate the entire organisation vertically through top-ranking prosecutors or not could be variable, depending on this difference. That is, a post-totalitarian prosecution service that sustains a relatively weak organisational hierarchy could be less effective in carrying out the president's partisan will, let alone their ordinary tasks, than a post-authoritarian one as a coherent actor.¹⁶ By contrast, a post-totalitarian prosecution service could be more politically neutral than a post-authoritarian prosecution service, because the former would be more vulnerable to the penetration of internal or external patrons, including major opposition parties, than the latter. Even in the post-totalitarian countries, nonetheless, an incumbent president can clearly enjoy a priority in exploiting civil-law prosecutors, over any other politicians, relying upon his ultimate control over their career as well as the intrinsic organisational hierarchy among them. At least, the prosecutors would be unable to bluntly go against him if the remainder of his tenure is long enough.

But an incumbent president can neither control the civil-law prosecution service nor abuse its extensive power in the last phase of his tenure. High-ranking prosecutors would have less incentive to keep their loyalty to the president, who could no longer have an influence on their careers and future as an individual interest. Even if a candidate of the ruling party has the most potential of taking the next presidency, the consistency between governments is much weaker under presidentialism than under parliamentarism. In addition, an outgoing president frequently has difficulty in cooperating even with the ruling party (Valenzuela 1993: 10). It is also uncommon for a retired president to exercise any political leverage. Thus, most of the high-ranking prosecutors, who have accumulated enough career capital to seek the post of prosecutors general or other core top-ranking positions under the next president, would strategically defect against the incumbent. Even the prosecutor general who has made a commitment to him is likely to think that it is more advantageous to betray than to support him at that juncture, similarly to other high-ranking executive officials or supreme judges (Grossman, Kumar and Rourke 2000: 229-230; Helmke 2002; 2005). Thus, they may pretend to be politically neutral or change their political patron to a leading

¹⁶ It cannot be denied that some prosecutors would be individually tempted to seek economic rents even under a presidential system, but it is impossible that the prosecution service as a single organisation would be bought off by a particular business power, due to the hierarchical nature among civil-law prosecutors. Rather, the real problem here is that the prosecutors would be hierarchically motivated to demonstrate either loyalty or betrayal towards an incumbent president under presidentialism, in contrast to parliamentarism, under which they are hierarchically induced to preserve political impartiality.

candidate, for maximising the chance of their job in the next government. At any rate, it cannot be an irrational choice for the prosecutors to show off their professional capacity and morality by actively instituting criminal proceedings against corruptions involving the outgoing president. Then, low-ranking and middle-ranking prosecutors would also break away from the outgoing president, albeit unintentionally, along with presidential electoral cycles.¹⁷ Therefore, under the institutional combination of presidentialism and a civil-law prosecution system, if political competition is high and an incumbent president seeks to abuse the prosecutors' far-reaching power, they serve him during most of his tenure, but betray him in his last phase, following the top rankers' strategic choice, in accordance with Hypothesis I-1.

Then, it must not be ignored that the difference in the organisational hierarchies between a post-authoritarian and a post-totalitarian prosecution service can more critically stand out in the dynamic of a split between an incumbent president and civil-law prosecutors, than in that of alliance between them. In the former case, the prosecution service would betray an outgoing president, as an almost unitary actor, whereas in the latter case, the degree of behavioural unity would be comparatively weaker. Considering that fragmentation and factional conflicts would be more widespread in a post-totalitarian state bureaucracy than in a post-authoritarian one, it is less apparent that the faction of a prosecutor general or other high-ranking prosecutors which is defecting against the current president can gain agreements from all other factions. Moreover, under the career system based not firmly on bureaucratic systemisation, an incumbent president may be able to delay the time when the majority of prosecutors betray him, by altering top rankers repeatedly, whereas under the system founded on the impersonal and legally-formal rationality, a current president cannot arbitrarily reshuffle top-ranking prosecutors but appoint his loyalists to core positions only in official seasons for personnel changes. Thus, a post-totalitarian prosecution service can betray an incumbent president in a less exact manner, than a post-authoritarian prosecution service at the last phase of his tenure. Nonetheless, Hypothesis I could be still applicable, in the respect that top-ranking prosecutors, who strategically betray an outgoing president for their career development, are predicted to appear also in the post-totalitarian countries.

¹⁷ Of course, the rapid increases of prosecutors' investigation and indictment against the president and his faction at the last phase of his tenure, is also because then more and more 'deep throats' would inform on their corruption scandals to them (*Gyeonghyang Sinmun* 24 April 2012). However, this explanation can be understood in the same context of the prosecutors' defection at the last moment. In particular, a considerable number of the 'deep throats' may be working in the prosecutor's office itself. Thus, it does not run counter to the hypotheses of this thesis.

In the absence of political competition, on the other hand, an incumbent president might avoid the civil-law prosecutors' defection even in the last phase of his tenure. If political competition is extremely lowered and therefore no candidate from the opposition parties has the potential of taking the next presidency, high-ranking prosecutors who wish to develop their career would have no alternative except for the candidate of the ruling party. As stated previously, civil-law prosecutors are expected to betray an incumbent president at his last moment, because presidential systems often show a weak consistence between an outgoing and incoming government. However, in the absence of political competition as under an electoral authoritarian regime, the next president can be selected through an institutional negotiation among the current president and other factions within the regime (Magaloni 2008b: 724-725). Moreover, the president may even choose his successor by himself, if his personal power base is consolidated, especially in high public support for him. Then, high-ranking prosecutors will have no incentive to defect against the incumbent president for career development, and low or middle rankers will also follow this tendency, even in his last phase. That is, if political competition is eliminated, prosecutors would not betray him at the end, even under the institutional combination of a civil-law prosecution system and presidentialism, as Hypothesis III suggests.

The politicisation of criminal justice: political competition and president's long-term interest in reform against civil-law prosecutors

The politicisation of criminal justice appears mostly in such dynamic, where an incumbent president abuses the civil-law prosecutors' extensive power over criminal procedure as a political weapon, but encounters their defection in the last phase of his tenure, under the institutional combination of a civil law prosecution system and presidentialism. On the other hand, yet, elected politicians including the incumbent president would sometimes attempt reform to curtail the prosecutors' far-reaching power, as the dynamic reproduces an institutional disequilibrium. Under presidentialism, opposition parties would seldom have an incentive to oppose reform of a civil-law prosecution system because they naturally have a disadvantage in politicising criminal justice. By contrast, an incumbent president tends to have less incentive to launch the reform, at least in short-term perspective, than the opposition parties, since he can enjoy an absolute advantage in abusing their great power.

As discussed above, nevertheless, we need to pay attention to that a current ruling party, afraid of losing its government under political competition, has sometimes voluntarily enhanced independence of the judiciary (Finkel 2005; Magalhães 1999; Ramseyer 1994).

The dominant party can foresee the severity of revenge by the opposition parties, which may occur when it become a political minority. Even though a strong president would be often reluctant to relinquish the judiciary, in particular a civil-law prosecution service, due to its effective value as a political weapon, he also could not help but have a long-term interest increasingly in making the prosecutors impartial, because of the dilemma of his fateful ‘lame duck’ period. However, to carelessly enhance the independence of civil-law prosecutors could seldom be an option for all the politicians, let alone the president, given their pre-emptive and fatal power in criminal proceedings (Hamilton 2011: 7). Therefore, the president would have a long-term interest in reform to reduce their massive power over criminal procedure.

In spite of the elected politicians’ interest in reform of a civil-law prosecution service, however, it is difficult to succeed in correcting the institutional disharmony. First of all, in a majoritarian democracy, especially in a presidential one, opposition parties would seldom have an incentive to cooperate with an incumbent president’s policy initiatives (Pereira, Maravall and Przeworski 1993: 210-211). The opposition parties would like to improve the chances for taking possession of the executive branch in the next presidential election, by leaving or encouraging the president and ruling party to fail in the policy initiatives. The effect of the strategy of opposition parties could be strengthened in the circumstance of a divided government. Even the ruling party the president belongs to sometimes might not strongly support him (Diermeier and Feddersen 1998). This is why Mainwaring (1992: 112) argues that an incumbent president can possess the power to suggest policies, but cannot easily gain the resources required for implementing them. On the other side, an incumbent president would also not concede many things to the opposition forces on the grounds of his overconfidence based on the plebiscitary legitimacy (Lijphart 1994: 105; Linz 1990: 61). This means that political conflicts would occur also in quite specific policy-making processes under presidentialism. In addition, as mentioned above, a political competition tends to be more serious in emerging democracies than in mature ones. As a result, it is essentially difficult for both the ruling and opposition parties to form a political consensus for major reforms in new democracies with a presidential system. Large-scale reform of a civil-law prosecution service also cannot be an exception.

By contrast, civil-law prosecutors have strong capacities in protecting their prerogatives. According to Hellman (1998: 222), ‘transitional winners’ could effectively protect their collective interests, through their direct and strong veto power in the process of reforms,

relying on superior power bases, their concentrated privileges as a selective incentive, and relatively small number of homogeneous members. If so, in some new democracies, an extreme type of civil-law prosecution service, which holds both the powers to investigate and indict criminal suspects, and even *Opportunitätsprinzip*, can be understood as a typical ‘transitional winner.’ Indeed the prosecutors have the capacities not only for assault on their political enemies but also for collective action – as Olson’s main notion (1965).¹⁸ In addition, their solid organisational hierarchy could contribute partly to maximising their capability for collective action.

On these conditions, civil-law prosecutors can enjoy a significantly advantageous political opportunity to resist the reform against them and to defend their prerogatives, even though politicians actually launch such a reform. As discussed above, an incumbent president would sometimes pursue his long-term interest in reform against civil-law prosecutors, owing to the possibility of their defection in the last phase of his tenure, while he would seek to exploit them more often. However, even though the president has a small desire for reform, the prosecution service can easily defeat his plan by lobbying or placating him through their voice – as one of Hirschman’s notions (1970).¹⁹ When the president is confronted with the civil-law prosecutors’ voice, he is likely to abandon the reform totally or be satisfied with only small achievements, because he fears the political loss, in both the aspects of assault and defence, coming from their defection against him. Thus, under the institutional combination of presidentialism and a civil-law prosecution system, as long as an incumbent president seeks to abuse the prosecutors’ great power, any large-scale reform plan against them would be suspended, in accordance with Hypothesis I-2.

Nonetheless, if an incumbent president dares to repeatedly attempt major reform against civil-law prosecutors in a long-term perspective, they would stop devoting loyalty to the president and remove his unilateral advantage in the politicisation of criminal justice, but target him via their organisational resistance, based on their extensive power over criminal procedure, as a collective action. This is in fact a rational option for the prosecutors, because the cost the reform would impose on them is expensive while the effect the organisational resistance could provide is so great. On the one hand, as curtailment of the civil-law prosecutors’ prerogative power would be sharply against their collective interest,

¹⁸ Undoubtedly, the small number of members and the presence of selective incentives are the two core conditions for a collective action, as Olson (1965) points out.

¹⁹ When any disadvantageous reform is imposed on the prosecutors, some of them can individually choose the exit as Hirschman’s another notion (1970), but cannot collectively do so, because they are also just state officials belonging to the executive branch.

all the members could be motivated to join collective action. Moreover, the high-ranking prosecutors' loss when becoming a traitor to their own organisation would be no less than their individual interest from their career development in exchange for their loyalty to the reformist president.²⁰ Hence, their organisational resistance must be much more coherent and stronger than their betrayal, simply following high rankers' strategic choice, against an outgoing president. On the other hand, as noted above, the probability that an incumbent president would be involved in corruption is even higher than any other politician. Thus, if civil-law prosecutors refuse to guard him, the president could become the most vulnerable political actor to the politicisation of criminal justice. Indeed, an incumbent president can have no way to protect his close allies from the prosecutors' selective investigation or indictment in the form of organisational resistance. Even the superpresidentialism could allow the president no power to revoke the prosecutors' institution of criminal proceedings against his faction, but ensure his constitutional superiority over the legislature. Opposition parties, particularly major ones, which have naturally not cooperated with the president, also would hardly have an incentive to support his attempt for reform against civil-law prosecutors, given that the political scandals involving the president's faction are being disclosed by them. Instead, they are predicted to enjoy the presidents' loss of popularity resulting from the prosecutors' initiative, and further to expect that they will swallow the executive branch in the next presidential election. Of course, the public support for him will also increasingly decline.²¹

Hence, if an incumbent president strongly pushes ahead with major reform against civil-law prosecutors, they would make an organisational resistance, fully utilising the political opportunity, which enables them to maximise the effect of their political manipulation of criminal justice and therefore to protect their collective interest. As a result, the president would be unable to keep the momentum for large-scale reform against the prosecutors, facing their organisational resistance against him, in accordance with Hypothesis II. Also in this circumstance, a post-authoritarian prosecution service is expected to behave more coherently than a post-totalitarian one. Nonetheless, the latter can also make a significant

²⁰ It is hardly possible that a top-ranking bureaucrat, who has been advanced to the current position in an organisation, supports to the policies against his own ministry or agency, because he would be a dyed in the wool member of the organisation.

²¹ By nature, citizens do not tend to strongly support prosecution service reform, owing to its technical complexity, though they would be the long-term beneficiaries of the reform. Moreover, they would distrust the reformist politicians, in particular the president, who are investigated by prosecutors, more strongly than ever. It would take a long time for the people to trust the politicians more than the prosecutors, and to lend their strong support to the reform.

threat to the president through the organisational resistance, since the defection is not just led by the high rankers' betrayal but by all the members' collective action.

On the other hand, the case that opposition parties launch major reform against a civil-law prosecution service is not different from the situation of the frequent political incentive structure for the prosecutors to manipulate criminal proceedings only in favour of a current president. Because the legislature cannot have a decisive effect on the prosecutors' career, they have a strong incentive to construct a political condition favourable for the president, by secretly threatening or selectively instituting criminal proceedings against members of the opposition parties. At least in a short-term perspective, the president would have no reason to have a grudge against the prosecutors, who voluntarily undermine his oppositions. He would condone or relish the prosecutors' partisan behaviour, and consequently the opposition parties could never secure their momentum for the reform. Thus, the reform against civil-law prosecutors, which is triggered by opposition parties, would only be an easily frangible challenge to them.

In sum, both presidential and opposition factions have difficulty in curtailing the civil-law prosecutors' enormous power, when the political conflict between them is serious. A high degree of political competition, in new democratic countries, not only impedes a political consensus between the president and opposition forces but also makes both of them vulnerable to the politicisation of criminal justice. Hence, if any political faction launches to reform against civil-law prosecutors, they can selectively initiate criminal proceedings against the politicians belonging to the faction, and therefore its momentum for the reform will be considerably weakened. Then, even an incumbent president cannot be an exception. Thus, no major change on the prosecution service can be easily accomplished under the "stabilised" institutional arrangement of combination of presidentialism and a civil-law prosecution system without any external shock, despite its institutional disequilibrium, in accordance with a main logic of the new institutionalism (Hall and Taylor 1996; Thelen 1999; Thelen and Steinmo 1992).

However, if an incumbent president and his political faction would become no longer vulnerable to the judicialisation of politics catalysed by civil-law prosecutors, the political opportunity for the prosecutors to effectively resist reform against them would be totally reversed. For instance, as noted above, a hegemonic party could almost dominate domestic politics or an electoral authoritarian regime could emerge, and correspondingly political

competition would be eliminated. Even in this circumstance, an incumbent president might still seek to exploit the civil-law prosecution service for his personal authority, like traditional dictators. Nonetheless, the semi-authoritarian regime or the president as a semi-dictator may also pursue its long-term interest in making the civil-law prosecution service politically neutral for its fear of losing the hegemony whenever, as long as it could not eradicate regular elections. In particular, according to Geddes (1999: 132-133), the more power an authoritarian ruler holds in his own hand, the stronger incentive he has to weaken the institutions which will serve as power bases for future challengers. But civil-law prosecutors can no longer enjoy their advantageous political opportunity enabling them to easily defeat unfavourable reform, because the semi-authoritarian regime would be much freer from losing moral legitimacy, than any government in a competitive democracy. As a result, if an incumbent president launches large-scale reform against civil-law prosecutors to realise his long-term interest in the absence of political competition, the prosecutors cannot help but abandon the organisational resistance to protect their collective interest, and correspondingly accept the changes imposed on them, in accordance with Hypothesis III.

Chapter III: Presidents' abuse of the prosecution service, and the politicisation of criminal justice in South Korea

This chapter aims to explain why prosecutors often exercise their extensive power in favour of an incumbent president during most of his tenure, but betray him in his last phase, under the institutional combination of a civil-law prosecution system and presidentialism, via an analysis of some empirical cases in South Korea after democratisation. According to Hypothesis I-1 of this thesis, under the institutional combination of presidentialism and a civil-law prosecution system, if political competition is high and an incumbent president seeks to abuse the prosecutors' huge power, they would manipulate criminal proceedings in favour of him during most of his tenure, but betray him in his last phase. To test this hypothesis, first, this chapter describes the prosecution system which contains the core features of a civil-law tradition, and the presidential system which enables an incumbent president to compose and manage the executive branch almost exclusively, as the two institutional preconditions for the alliance or separation between an incumbent president and prosecutors, in South Korea after democratisation. Secondly, this chapter empirically explains why South Korean President Young-sam Kim (YS) and Dae-jung Kim (DJ) had exploited prosecutors for the politicisation of criminal justice in favour of them during most of their tenure, but faced their defection at their last phase, under the institutional combination of the civil-law prosecution system and presidentialism.

3. 1. Institutional preconditions for main actors' strategic behaviour

3. 1. 1. The South Korean Prosecution System

The far-reaching power of the prosecution service

In South Korea, the military authoritarian regimes had exploited the prosecution service as one of their main power resources, for securing their survival. In the special situation of

division of Korea into North and South, above all, the military and Central Intelligence Service (present NIS) helped the regimes to coercively keep various political opposition groups under control, by threatening them in advance. However, the prosecution service was also considered quite useful for these regimes, because they could tactically suppress the oppositions through the prosecutors' institutional role. The regimes could delegitimise their oppositions, ordering the prosecutors to initiate and manipulate criminal proceedings against them, even under the pretext of the rule of law (Han 2000: 202-204). Yet, all types of prosecution service cannot be allowed to control criminal cases. As mentioned above, common-law prosecutors cannot easily manipulate criminal proceedings, whereas civil-law ones can do it because of their broad power over criminal procedure. In this context, since the first enactment of the Criminal Procedure Act (Hyeongsasosongbeop) based on a civil-law tradition in 1954, the power bases of the South Korean Prosecution Service had been consistently reinforced by the authoritarian regimes, especially President Jung-hee Park's, regime, until democratisation in 1987.¹ From the beginning, most of all, the prosecution service was allowed to exercise more extensive power in criminal proceedings, in order to serve the authoritarian leaderships effectively, than the equivalents, which somewhat keep themselves from holding arbitrary power, through some institutional checks, in the typical civil-law countries.

Then, a more critical point is that the prosecution service is still sustaining the enormous power and unusually high prestige almost identically to the previous version, even since democratisation. Although a few minor reform plans against the prosecution service were achieved by the democratic governments under President DJ and Moo-hyun Roh (MH), the civil-law prosecutor's enormous power have rarely been curtailed.² Specifically, the South Korean prosecutors still hold the wide jurisdiction, such as the right to command police officers during investigations, the investigatory power of their own, the exclusive authority of indictment, and even the guarantee of *Opportunitätsprinzip*. The combination of these prerogatives enables them to exercise enormously broad power over criminal procedure, when compared with the power of prosecutors in any other civil-law countries.

¹ The Criminal Procedure Act was enacted in 1954 for the first time, but has not significantly been amended to today. However, the act began to be interpreted to actually ensure the prosecutors' dominant power in criminal proceedings along with Jung-hee Park's military *coup* in 1961, and this practice was rarely changed even throughout democratisation in 1987. For convenience, this thesis mainly refers to the Criminal Procedure Act revised in November 1987, but follows minor changes in the act if required.

² For the South Korean Presidents' attempts to reform the prosecution service after democratisation, Chapter IV will explain more in detail.

First of all, the South Korean Prosecution Service actually controls criminal investigations. Investigators of other law enforcement agencies, in particular the police agency, must obey prosecutors and can conduct only an ancillary role in this phase, according to the Criminal Procedure Act (Article 195; 196).³ Although the investigative officers have actually initiated a criminal investigation and opened a criminal proceeding *de facto* autonomously, the Operational Code of Judicial Police (Teukbyeolsabeopgyeongchalgwalli jimmugyuchik) imposes on them a duty to report all the information and progresses about the criminal case to prosecutors with the opening of the criminal proceeding (Article 11; 12). In particular, the investigative officers have no choice but to ask the prosecutors when gaining an arrest (custody) or detention warrants from judges. The constitution (Daehanminguk heonbeop) enacted in 1987 rules the prosecutors' monopolistic right to request the warrants from courts, which is a distinct feature of South Korea. Moreover, the Prosecutor's Office Law (Geomchalcheongbeop)⁴ permits prosecutors to stop the investigators' activities at any time, and to transfer an investigative officer from a position to another for excluding him from a specific criminal investigation (Article 54). In addition, the prosecution service retains more than 5,000 of investigators of its own, despite about 2,000 of prosecutors (Kim, Seo, Oh and Ha 2011: 146). These prerogative powers were of course designed for prosecutors to monitor illegal activities of the investigators in the stages of a criminal investigation, but often failed in preventing their own crime or corruption by deepening the vertical dependency of investigative officers on them. Above all, the Operational Code of Judicial Police does not allow the investigators to terminate a criminal case (Article 54). Only prosecutors can close a criminal investigation right before the phase of indictment. Hence, the South Korean Police Agency is bound to remain as a secondary actor in the phase of criminal investigation.

It cannot be denied that the police agency has depended rather more on the prosecution service in the phase of criminal investigation in South Korea, than in other traditional civil-law countries. However, the South Korean prosecutors' investigatory power *per se* should not be overemphasised as immoderate power, given that civil-law prosecutors generally hold the broad jurisdiction from investigation to indictment. Instead, as the prosecutors'

³ In South Korea, all the investigative officers of law enforcement agencies, such as the Police Agency, the Tax Service, and even the Prosecution service itself, are called as judicial police, but this thesis names only the investigators in the other law enforcement agencies, besides the Police Agency, as investigators or investigative offices, in order to distinguish them from police officers (the investigators belonging to the Police Agency).

⁴ The Prosecutor's Office Law was enacted in 1949 along with the foundation of the Republic of Korea, but has not considerably been amended to today. For convenience, this thesis mainly refers to the Prosecutor's Office Law revised in December 1988, but follows minor changes in the law if required.

investigative powers are combined with their great power in the phase of indictment, their too extensive power in criminal proceedings has been generated. According to the Criminal Procedure Act, the South Korean prosecutors are guaranteed not only to exercise the monopolistic right to indict a criminal suspect, but also to decide whether or not to indict him for a trial on the basis of *Opportunitätsprinzip* (Article 247; 248). Considering that even common-law prosecutors who can hardly hold the power for criminal investigation have to share the right to decide whether or not to indict a criminal suspect with the grand jury, only the combination of the monopolistic indictment and *Opportunitätsprinzip* can grant quite enormous power to prosecutors in South Korea. Yet, moreover, South Korean prosecutors themselves can investigate criminal cases, mainly relying on their power to command other law enforcement agencies during investigations. As noted in Chapter II, the German Prosecution Service following a typical civil-law system has not adopted *Opportunitätsprinzip*, and in France prosecutors must hand over the investigative powers to the instructing judges on a few high-profile criminal cases. Thus, almost no prosecution service in the world possesses extensive power over criminal procedure as much as in South Korea. Indeed, this power apparatus can do everything arbitrarily, at least in the pre-trial stages of a criminal proceeding (Kim 2004: 209-219).

Thus, concerning the South Korean Prosecution Service, the most critical point is that the prosecutors' enormously broad power throughout all the pre-trial stages of a criminal proceeding could be misused for the political manipulation of criminal justice, when they are not motivated to be impartial. Both conservative and progressive newspapers have consistently criticised that prosecutors selectively institute criminal proceedings against certain politicians or social forces, and give immunity to the others' illegal behaviours, with their own timing and extent (*Donga Ilbo* 17 August 2001; *Hanguk Ilbo* 29 December 2009; *Hangyeore Sinmun* 14 October 2005). The fact that the indictments by the Central Investigative Department of Supreme Prosecutor's Office (CID) – which mainly deal with high-profile criminal cases – have been overturned by courts 30 times more than those by other prosecutors, could also demonstrate the partisan behaviours of this apparatus (Kim, Seo, Oh and Ha 2011: 161-162). A human rights lawyer, requesting anonymity, who had ever defended a major opposition politician also stated, "I was strongly impressed that the prosecution service was purposely manipulating the criminal proceeding against him," in an interview with me (6 January 2014). In addition, prosecutors often intentionally leak the information of their targets during investigations, and consequently the press indiscreetly reports the criminal suspects, guessing that the prosecutors can surely extend the criminal

proceedings into indictments of them through their enormously wide power over criminal procedure. According to a celebrated journalist, former President of Korea Broadcasting System (KBS) Youn-joo Jung⁵, the presumption of innocence has been frequently broken before the judges' final decision, and the targeted politicians or forces could not help losing a considerable part of their moral legitimacy and political support, in this way (*Hangyeore Sinmun* 26 January 2010: 30).⁶ In South Korea since democratisation, as a consequence, the prosecution service has often abused its enormous power for influencing national elections as well as ideological agenda contests in civil society, in favour of a particular political faction, big business or itself.

The strong organisational hierarchy of the prosecution service

In South Korea, the prosecution service entails a very strong organisational hierarchy. In the pyramid-like organisational setup where the prosecutor general is at the top, all higher rankers' orders, instructions and regulations are strictly obeyed by lower rankers. Indeed, this norm is ruled as the 'principle of a single and centralised prosecution service' in the Prosecutor's Office Law. As stated above, this principle helped the authoritarian regimes to dominate the prosecutor's offices vertically, through the prosecutor general and other top rankers, for the purpose of their own political ends. Although the 'principle of a single and centralised prosecution service' itself was eliminated along with the amendment of the Prosecutor's Office Law in January 2004, the real contents of the principle still remain in the law, and the organisational hierarchy also still works rigorously.⁷ Besides the 'principle of a single and centralised prosecution service,' the Prosecutor's Office Law defines that a prosecutor must follow his superior's commands and supervision (Article 7).

According to the Prosecutor's Office Law, especially, the prosecutor general as the chief of Supreme Prosecutor's Office (SPO) can ultimately control all the works of the prosecution service, and the chiefs of High and District Prosecutor's Offices can also do those in their own territory, on the basis of the authority to direct and supervise their own office (Article 12; 17; 21). In particular, these top-ranking prosecutors hold the right to distribute criminal cases to specific prosecutors, divisions and departments. They can exercise even the power

⁵ The prosecution service indicted Youn-joo Jung in charge of his embezzlement during his term of the presidency in the KBS, in spite of much public criticism against the criminal proceeding. However, the court rejected the prosecutors' decision on the ground of as many as 10 reasons (*Hangyeore Sinmun* 22 January 2010).

⁶ It also seems ironic that the press, which has seriously criticised the prosecutors' manipulation of criminal proceedings on politicians, often contributes to the damage of the presumption of innocence by increasing the prosecutors' influence.

⁷ The amendment of the Prosecutor's Office Law in January 2004 will be dealt with once again in Chapter IV.

to withdraw a criminal case from a prosecutor or a division who does not match up to their orders, and to reassign it to another (Article 7). Of course, the budget execution for each department and division of the offices is also controlled by the chiefs. In this situation, it cannot be easy for lower-ranking prosecutors to disobey higher rankers, let alone the top rankers.

Yet, the mechanism of advancement on the bureaucratic career ladder is a more critical factor to consolidate the organisational hierarchy of the South Korean Prosecution Service, than the legal statutes. As discussed above, in a pyramid-like organisational structure, the members consider their career promotion as one of the most valuable goals, since it is a common institutional way to reward them with money, prestige, and personal influence all together. In South Korea, the power of the prosecution service is enormous, and the senior prosecutors' social influence is great. Moreover, a prosecutor's rank and position at that time when he resigns from the prosecution service *de facto* determine his income at his new job of a private lawyer (*Jugan Gyeonghyang* 15 February 2011; *Segye Ilbo* 3 February 2010). Thus, the institutional mechanism of career advancement can be decisive for the organisational hierarchy of this apparatus. Unless the prosecutors' career is determined on the basis of rational procedure and objective criteria, factional conflicts would be prevalent within the prosecution service, and therefore the organisational hierarchy and cohesiveness would be undermined. This is why the South Korean Prosecution Service has employed seniority and professional performance as the strict criteria for elevating a prosecutor to upper ranks, though this can be regarded as a legacy of the post-authoritarian bureaucracy.

In South Korea, unless a prosecutor has accumulated seniority to a certain extent, he can rarely get promoted to higher ranks. Regarding this, as the former Minister of Justice Kum-sil Kang said, "Due to the strong emphasis on seniority in the prosecution service, when a prosecutor even occasionally gets promoted to a top-ranking post earlier than some others who had entered this organ before he did, they have no choice but to resign customarily" (*Hangyeore Sinmun* 1 March 2003: 1). As a result, the adoption of seniority as an objective criterion for career advancement can contribute to the strong organisational hierarchy of the prosecution service, by preventing indiscipline among the prosecutors, and more importantly, by ensuring quite a stable career prospect for them.

But a more crucial bureaucratic element for the organisational hierarchy of South Korean Prosecution Service is that a prosecutor has to make a good professional performance, for

his elevation to upper ranks. This criterion is ruled in the Prosecutor's Office Law (Article 35). In South Korea, the prosecution service accompanies as many as seven ranks of bureaucratic career ladder: the prosecutor general, the chief of a high prosecutor's office, the chief of a district prosecutor's office, the deputy chief prosecutor, head prosecutor, superior prosecutor, and prosecutor.⁸ Moreover, which positions a prosecutor has held and where he has worked can have a critical influence on his promotion and new post, because the disparity is also wide within a same rank, depending on the positional and regional differences. Thus, prosecutors can be ceaselessly motivated not to seek corrupt rents or join a faction – albeit not totally successful – but to accumulate seniority and carry out given tasks diligently, which contribute to the firm organisational hierarchy of the South Korean Prosecution Service.⁹ Though elected politicians have a decisive effect on the selection of top rankers, the prosecutors who have accrued a low seniority or made bad performances cannot be even nominated for the key positions (Cho 2010: 118).

However, this strong organisational hierarchy based on the bureaucratic elements in career system can cause a critical problem. As explained above, when top-ranking prosecutors hold a partisan position, the entire prosecution service would be induced to follow this stance, like the other bureaucracies in South Korea. Since the objective assessment of a prosecutor's performance also cannot help but depend mainly on experts of the same kind, he must be *de facto* automatically motivated to make a commitment to the goals of his own organisation. Then, even though the prosecutor is depoliticised, he may unintentionally contribute to the manipulation of specific criminal proceedings, while simply conducting the tasks assigned by his partisan superiors. For instance, the prosecutor general is able to control socially important criminal proceedings on major politicians or entrepreneurs, by relocating these high-profile criminal cases to the CID.¹⁰ This is why the CID has often

⁸ In South Korea, a top-ranking prosecutor largely means who holds a rank of the prosecutor general, the deputy prosecutor general, the chief of a high prosecutor's office, and the chief of a district prosecutor's office. Then, for example, the deputy prosecutor general holds an equal rank with the chief of a high prosecutor's office, and the head of a department of the SPO has an equal rank with the chief of a district prosecutor's office. In the same way, a senior prosecutor could be approximately regarded as one of the deputy chief prosecutors and head prosecutors in district prosecutor's offices. Although these ranks of bureaucratic career ladder were reduced to only two ranks: the prosecutor general and prosecutor in 2004, the previous bureaucratic career ladder still has an important meaning for a prosecutor's life.

⁹ Low-ranking prosecutors' corruption scandals have sometimes been revealed (*Gungmin Ilbo* 2 December 2011; *Gyeonghyang Sinmun* 28 January 2011), and the inter-regional conflicts between the prosecutors from Gyeongsang and those from Jeolla have occasionally occurred (Cho 2010: 96-141), but these have not damaged their strong organisational hierarchy to a serious extent.

¹⁰ As explained in Chapter II, the hierarchy among top-ranking prosecutors is formal rather than substantive. As the head of the CID is also accountable more to the president than to the prosecutor general, the head may not comply with the prosecutor general, when the prosecutor general attempt to go against the president in the middle of his tenure or supports him even in the last phase of his tenure. However, the possibility of this division is not so high. The next section will explore this again through some empirical cases.

intensified the danger of the judicialisation of politics, via criminal proceedings against particular political factions or business groups. Then, junior prosecutors of this department may not hold any political bias, but professionally carry out orders from his partisan seniors only to bring performances required for the sake of their career development. In this way, all the prosecutors can hierarchically contribute to the politicisation of criminal justice for serving their ultimate appointer, such as an incumbent president in a presidential system, or for protecting their organisational goals.

3. 1. 2. The South Korean Presidency

The president's constitutional power to compose the executive branch

In South Korea, since democratisation came from the pact between political elites – the then current military authoritarian and opposition party forces – along with the resignation of Doo-hwan Chun's authoritarian regime in 1987, the reasonable form of government could not help but arise as the most critical issue in the constitutional amendment (Cho 2000; Choi 2002: 111-115). On the one hand, the incumbent authoritarian force initially wished to change the existing presidential system to a parliamentary one in order to ensure their survival, by winning the government again or at least by gaining a part of the new parliamentary power in the post-authoritarian period. On the other hand, the political opposition force – YS and DJ were leading it together – had continuously fought for the adoption of the presidency electorates directly vote for in a national contest. Although the politicians of the opposition force shared other goals of political and economic reforms with such social movement forces as labour unions, religious groups, student activists and so forth, their first target for democratisation was unquestionably to achieve a popularly elected presidency. Eventually, as some moderates in the authoritarian force accepted the direct presidential election and the politicians of the opposition force also agreed on it, a number of the other requirements for further democratisation were abandoned.¹¹ That is, radical but important requests of the outside social forces were excluded from the new constitution ratified in October 1987. Then, relevant to this thesis, the most critical fact is that the president's constitutional power to form and manage the executive branch was hardly weakened, compared with the presidency in the authoritarian era, although a few

¹¹ The strategy of the incumbent authoritarian force could be considered a success, in that the political heir of Doo-hwan Chun's military regime, Tae-woo Roh (Democratic Justice Party) defeated YS (Reunification Democratic Party) and DJ (Peace Democratic Party), who could not agree on a single opposition candidate but ran separately, and eventually won the presidency in December 1987, in the first presidential election after democratisation.

legislative powers for a *priori* and a *posteriori* check over the composition of the executive were introduced in the 1987 Constitution.

The 1987 Constitution guarantees the South Korean President's comprehensive power to form the executive branch (Article 86; 87; 88). The president can select all the candidates for ministerial positions and lead the Cabinet Council *de facto* autonomously from the other branches of government. The National Assembly cannot exercise any initiative to form the executive leadership. The legislature is able to refuse the nominee for the post of prime minister, but the effect is limited because the president can repeatedly nominate his preferred candidates for this position. For example, in 2002, DJ failed twice to assign his preferred candidate for the post of prime minister due to the veto from the legislature, and narrowly succeeded in the appointment the third time (*Hanguk Ilbo* 11 October 2002). The new Prime Minister Seuk-soo Kim was a comparatively non-partisan person, but he and his ministers were also not the cabinet members the majority opposition party (Grand National Party: GNP) preferred. Above all, the prime minister is *ex post* accountable only to the president, since the constitution does not define the legal tenure of a prime minister, not to mention the other ministers. Hence, the prime minister does not have to demonstrate loyalty to other political factions than an incumbent president and his faction.

Besides the appointment of a prime minister, the president can appoint the other ministers with no confirmation from the legislature. Although Article 87 of the constitution grants the prime minister the right to recommend the candidate for each ministerial post to the president, this is not substantive because the former is institutionally subject to the latter. For instance, in December 1993, Prime Minister Hoi-chang Lee (HC)¹² officially asked President YS to ensure his power to recommend ministerial candidates, relying on a stricter constitutional reading of Article 87, but YS refused his request on the grounds that the power to choose ministers belongs to the president's own jurisdiction (*Hangyeore Sinmun* 19 December 1993: 4). Afterwards, YS and HC fought continuously over similar issues regarding the management of the executive branch, and HC finally left the position of prime minister within four months after his appointment (*Maeil Gyeongje* 23 April 1994). That is to say, a South Korean President is able to select all of ministers, based on his preference. Also given that the Cabinet Council is composed of ministers who are *ex post* accountable only to the president, he can exercise the actual power to control the council,

¹² Interestingly, HC challenged twice for presidency as the candidate of the majority party (Grand National Party), but was consecutively defeated by DJ in 1997 and MH in 2002. As HC had been one of the key political rivals of the two South Korean Presidents, he is also treated as a major political actor in this thesis.

and correspondingly dominate every decision-making process in the executive branch.

In addition, the South Korean President's authority to choose the nominees for core state positions is not limited to ministers of the executive branch. The 1987 Constitution granted the president the power to nominate the candidates for the chiefs of other power organs, including law enforcement agencies, which can be seen to belong to the executive branch, but should remain politically impartial. Specifically, the president can appoint the chief of the Board of Audit and Inspection of Korea (BAI) under the confirmation of the National Assembly in the same way as the appointment of prime minister (Article 98). In addition, he holds the right to recommend the chiefs of the National Intelligence Service (NIS), the police agency, the prosecution service, and the military, in the Cabinet Council (Article 89). Considering that the members of the Cabinet Council hardly have an incentive to go against the president's will as noted above, there is a high probability that the chiefs of these power agencies would be selected to serve his preference. Moreover, the president deeply intervenes even in the formation of the judicial branch. He can choose the supreme judges – though the nomination of the Chief Justice of the Supreme Court and the approval of the National Assembly are required for these appointments –, and further select the three constitutional judges out of nine autonomously (Article 104; 111).

On the other hand, there can be a counterargument that the presidential power to form the executive branch and appoint the nominees for the other power organs will be significantly limited in a divided government. Since democratisation, the National Assembly has exerted the power to approve a prime minister, the chief of the state auditing board, the supreme judges, and the chief of the constitutional court. Then, as stated previously, a presidential system *per se* frequently brings about divided governments, and can deepen a political polarisation and conflicts.¹³ Therefore, there remains the possibility that the legislature dominated by opposition parties would drag a president down, and consistently refuse his nomination for these important state positions. In addition, according to the National Assembly Act (Gukoebeop) that was amended in 2000, 2003 and 2007, the legislature hold the right to open the confirmation hearings in order to verify not only all the members of Cabinet Council, but also the chiefs of the NIS, the Tax Service, the Police Agency, the SPO, and the candidates for other key state positions, though the legislature cannot reject

¹³ In addition, there are some other factors which can intensify the political conflict between the ruling and opposition parties in South Korea. Therefore, if a divided government would appear, the stalemate between the president and legislature could become unresolved, at least temporarily. These issues are explored in the next section.

the president's candidates but only recommend him to withdraw the nominations (Article 65).

Thus, an incumbent president may be predicted to fail in appointing his preferred nominees to the core state positions, frequently in the condition of a divided government, which can impose a political burden on him. However, a legislature led by opposition parties cannot continuously refuse the appointments, since it also cannot avoid being blamed for the continuous refusals. Even if a stalemate between the two democratic bodies was to appear, a political burden would be imposed on both sides. After all, the president is able to assign his preferred nominees to the important state posts even after one or two setbacks, as in the above example of Prime Minister Seuk-soo Kim. In other words, South Korean Presidents could encounter the veto from the legislature on some political appointees, but have no constitutional obligation to hand over his initiative in choosing the chiefs of core state bodies, as well as in composing a cabinet, to the legislature. According to Article 63 of the 1987 Constitution, the National Assembly can claim the dismissal of each minister, but this is also not compulsory for a president. Although the legislature's power can also impose a political burden on the president, this does not permit it to propose no-confidence against his cabinet, and above all, it is also difficult for this branch to use this power repeatedly.¹⁴

In sum, while the National Assembly may try to approve the most non-partisan nominees for some key state position including the prime minister, the president's *de facto* exclusive authority to form the executive branch and appoint his preferred figures for the chiefs of the other power organs cannot easily be weakened. However, the South Korean President's constitutional power is not the only resource that makes the cabinet and other power organs hold a partisan position in favour of him. Rather, a more critical mechanism that helps the president to attract a partisan loyalty from bureaucrats in the executive branch and law enforcement agencies is a custom, in which he frequently selects the chiefs through their advancement on the bureaucratic career ladder of each ministry and agency. This notable characteristic of South Korea is explained below.

¹⁴ It can be argued that this right of the National Assembly should be traded-off by granting the Presidency the power to dissolve the legislature. This argument would be grounded on the fact that the legislature might permanently drag a president down (Linz 1994: 61-62). But the effect of this power of the National Assembly must not be overemphasised, since it is totally different from the legislature's vote of no-confidence against the executive in parliamentary countries. Moreover, as discussed above, the president who obtains even the power to dissolve the legislature may make the perils of the 'president-parliamentary' system in South Korea.

The practice of ministerial-level appointment through the bureaucratic career ladder and the president's exhaustive control over the state bureaucracy

The South Korean state bureaucracy is generally recognised as a capable and coherent Weberian one. The East Asian developmental state theory suggests that the bureaucrats who have been recruited and promoted on the basis of their capacity are the most vital factor for the high economic development in this area, which includes South Korea as one of the prime examples (Amsden 1989; Evans 1995; Johnson 1987). In accordance with this theory, the state-led modernisation strategy could bring a surprising economic prosperity, from the 1960s to 1980s, in South Korea. Nonetheless, the East Asian developmental state theory tends to ignore the variables of politics. Also in South Korea, the capable state bureaucracy did not automatically target on economic development. Rather, the goal was imposed by the authoritarian presidents, Chung-hee Park and Doo-hwan Chun in a top-down way, given that their political survival was dependent on economic growth (Cheng 1990; Wade 1992). Therefore, the critical point is not just whether the state bureaucracy was capable or not, but how the authoritarian leaders could motivate their bureaucrats to make a commitment to the goal.

In South Korea, these authoritarian presidents were able to make the bureaucrats devote themselves to economic development as a partisan goal via two ways. First of all, they monitored and disciplined the state bureaucracy thoroughly (Ginsburg 2001: 615). The authoritarian rulers could dismiss the bureaucrats who were not loyal to them. However, a more critical mechanism to control the state bureaucracy was the practice, by which the presidents selected his ministers and the chiefs of law enforcement agencies through their advancement on the bureaucratic career ladder (Kang 2001: 9). This practice naturally gave senior bureaucrats a strong incentive to demonstrate loyalty to the presidents who had the exclusive authority to elevate them to core top-ranking posts. The top-ranking positions in the executive branch promised almost everything, such as money, power, and prestige at that time, though the posts still reward many benefits to their occupants also in the present. This is why state officials could be motivated to become less corrupted but to work harder to achieve the presidential goals in South Korea than in other developing countries.¹⁵ In addition, even low-ranking bureaucrats were induced to devote themselves to achieve the presidents' ends, given that they could not foresee when the authoritarian leaders would resign. Hence, coupled with the organisational hierarchy based on the legally-formal and

¹⁵ The bureaucrats were not fully prevented from occasional corruptions, but their first aim was to progress career by making a good professional performance. On the other hand, the corruption of the authoritarian presidents and their close allies were wider than that of the career bureaucrats.

impersonal mechanism, especially in the career system, to a certain extent (Kim 1971), the state bureaucracy devoting loyalty to the presidents could enable the authoritarian regimes to effectively accomplish economic development as the presidential goal,¹⁶ although the goal of partisan policies was often neither reasonable nor based on a democratic consensus.

Also since democratisation, this practice of advancement on the bureaucratic career ladder has been sustained in South Korea. As discussed above, this custom is encouraged on the grounds that the ministerial-level appointment through the bureaucratic career ladder can maximise the competitive edge in the bureaucrats' professional knowledge and operational capacity, and improve their morale. In South Korea, moreover, the 'spoils system' has been regarded simply as a sort of clientelistic reward derived from favoritism (Lee 1994: 1134-1135). Even after democratisation, in the same vein, all the South Korean Presidents have customarily advanced senior bureaucrats to ministers and deputy ministers, and the chiefs of the power organs (*Donga Ilbo* 26 May 1999; 5 February 2002; *Hanguk Ilbo* 28 February 2003; *Maeil Gyeongjae* 21 December 1995).

Thus, the senior bureaucrats who wish to gain advancement to the ministerial-level posts are still motivated to devote loyalty to an incumbent president and make a commitment to his partisan (sometimes private) will. Even in France where a president and prime minister share the power over bureaucrats' careers on the basis of the dual executive system, the politicisation of the executive bureaucracy is sometimes suggested as a problem (Suleiman 1994: 152-154). Hence, this peril is bound to appear more seriously in South Korea where a president holds the almost exclusive authority over the senior bureaucrats' elevation to upper ranks. The state bureaucracy, which executes policies only for serving the president while neglecting the other democratic bodies such as the legislature, is a clear problem.¹⁷ However, it is a more serious defect that the power agencies such as the board of audit or the prosecutor's offices, which are necessarily required to maintain political impartiality, also take a partisan behaviour in favour of the president. In reality, the selection of top-ranking prosecutors, let alone the prosecutor general, always brings about a violent quarrel

¹⁶ Yet, as stated above, the career promotion system based on political loyalty would bring about factional conflicts within an organisation. In particular, the authoritarian leadership broadly used ties rooted in families, schools and regions, in order to advance more faithful bureaucrats to top-ranking posts at low cost. Even after democratisation, the factional conflicts between state officials from Gyeongsang-do and those from Jeolla-do have often appeared, although the former has the preponderance over the latter. The firm organisational hierarchy based on bureaucratic elements could largely offset the inefficiency caused by the factionalisation, but fragmentation based on the informal networks would somewhat undermine bureaucratic autonomy, cohesiveness and efficiency in long-term perspective (Ha 2006: 85-115; Ro 1993: 158).

¹⁷ However, even the ministers who are loyal to the president are likely to resist his reformative policies against the interests of their own organisation.

among different political factions, because the prosecutors have not only showed loyalty to an incumbent president, but also will not easily be able to betray him, before and after their career development, respectively (*Joseon Ilbo* 30 January 1999).

On the other hand, Hahm (1999: 121-122) asserts that it became harder for an incumbent president to control the state bureaucracy as a whole, after democratisation, because low-ranking and middle-ranking bureaucrats cannot have a long-term career prospect, due to a relatively short presidential tenure. However, at least for short-term presidential initiatives, they will unconsciously lose their political neutrality while just carrying out regular tasks directed by the senior bureaucrats who are loyal to the president. Moreover, a president's short-term policy initiatives could often be connected to his private goals. It is undeniable that an incumbent president cannot more aggressively exploit the state bureaucracy in the present than in the authoritarian period. Since not only the state lost the autocratic power over economy and society but the rewards of career advancement to higher ranks also became less certain for bureaucrats than before, the organisational hierarchy among the bureaucrats has been undermined, and they have become more vulnerable to the capture of external influences such as big businesses than previously. Nonetheless, the custom of ministerial-level appointment through the bureaucratic career ladder still can allow an incumbent president an absolute priority in controlling the executive bureaucracy and other law enforcement agencies, over any other political actor. As noted ever, most importantly, the South Korean Prosecution Service, in particular the prosecutors of the department which handles high-profile criminal cases, would be uniformly induced to display a partisan behaviour, mainly in favour of an incumbent president, in this way (Shin and Chu 2004: 23). This is at least until the last part of the president's tenure.¹⁸ The next section examines the interaction between an incumbent president and prosecutors through some empirical cases during President YS's and DJ's periods.

¹⁸ A former senior prosecutor, requesting anonymity, by and large acknowledged the prosecutors' (especially top-rankers') political preference for an incumbent president, in an interview with me (8 July 2013).

3. 2. Presidents' abuse of the prosecution service and the politicisation of criminal justice in South Korea after democratisation

3. 2. 1. Political conflicts and polarisation in newly democratised South Korea¹⁹

As proposed throughout the framework in Chapter II, a presidential system itself would more often bring political conflicts and polarisation than a parliamentary system. The 'winner takes all' character of presidentialism can be well applied to South Korea after democratisation. A South Korean President also holds the *de facto* exclusive authority for the formation and management of the executive branch. Additionally, the president can mobilise the state bureaucracy to the utmost for his explicitly partisan policies, at least for short-term initiatives, relying on the practice of ministerial-level appointment through the bureaucratic career ladder. Therefore, the South Korean Presidents do not just operate but "own" the executive leadership and the state bureaucracy, and even exploit the strong law enforcement agencies, during their fixed term. This could be regarded as a typical 'winner takes all' feature owing to presidentialism. In South Korea after democratisation, as a result, the zero-sum competition for winning the presidency, among political parties or factions, could not help being intensified.

In South Korea, meanwhile, there has been one more element to influence the political polarisation and conflicts, besides the quite centralised presidential system. It is a serious political regionalism. Above all, the regional conflict between Gyeongsang-do and Jeolla-do has been so violent for approximately 40 years. Therefore, the political parties based on Gyeongsang have rarely obtained a legislative seat in the local constituencies of Jeolla. This tendency began as the authoritarian presidents, especially Jung-hee Park, aggravated the political regionalism in order to sustain their regime, via the 'divide and rule' strategy. These authoritarian leaders tried to obtain an overwhelming support in their hometown, North Gyeongsang with a relatively large population, but strategically abandoned the electorates of Jeolla. Moreover, they intentionally excluded the latter area also from the modernisation programmes (Park 2003). This is also why the local residents of Jeolla respected DJ as the greatest regional leader. Even after democratisation in 1987, this trend has continued as a legacy of the authoritarian era. Indeed, each political party or faction

¹⁹ For general explanations of the Korean Politics before and after democratisation, see Armstrong (2002); Clifford (1998); Cumings (1998); Henderson (1968); Oh (1999); Shin (1999), and so on.

has exploited the serious political regionalism more than in the undemocratic period, since authoritarian domination ended and political competition opened (Bae and Cotton 1993: 177; Jung 2009: 40). For instance, most of the legislative seats, which were occupied by the political parties of DJ, YS and even the authoritarian heirs, were based on their own region, Jeolla, South Gyeongsang, and North Gyeongsang, respectively. In the National Assembly election in April 2000, DJ's Millennium Democratic Party (MDP)²⁰ gained 25 seats out of 29 in Jeolla-do, while the GNP the former YS's political faction and the authoritarian successors belonged to together won 64 seats out of 65 in North and South Gyeongsang-dos. Although most of the authoritarian heirs, YS and DJ already faded out from the political arena, the parties succeeding them have continuously followed this pattern. With the remaining public anti-communism under the division of South and North Korea (Cho 2000: 410-412), the political regionalism has oppressed the other important political and societal cleavages, for example, labour, class, generation, gender issues, and so forth, for quite a long time.

Apparently, the political regionalism has been able to have a direct effect on the serious political competition in South Korea. Although it was initiated by political leaders at first, regional animosities actually existed among the mass. However, more importantly, the political regionalism has intensified a political polarisation and conflicts, by enabling each political party to sustain an extremely disciplined hierarchy, under presidentialism. Given that a political party can win almost all the legislative seats allocated to a particular region, if a politician is just nominated for one of the local constituencies within the region by the party, he can enter the National Assembly *de facto* automatically (Kang 2012: 10). Hence, the party leaders as a regional boss have been able to exercise a very strong power towards both incumbent and potential legislators, relying on their right to nominate the candidates for local constituencies, especially within the region the party is based on (Shin 1999: 180). YS and DJ could also enjoy the absolute authority over the members of their own party through their exclusive right to nominate the legislative candidates, which did not change even after they became the president.

Then, a critical problem is that strongly disciplined parties do not contribute to a stable political process under presidentialism, as Sartori (1994) points out. This problem has not ceased also in the South Korea after democratisation. On the one side, the opposition party

²⁰ President DJ created a new 'party of power,' changing the name of the ruling party from National Congress for New Politics (NCNP) to the MDP, for the legislative election in April 2000.

leaders, as a potential presidential candidate, would seldom have an incentive to cooperate with an incumbent president. Given that the president's repeated failure in policies could enable the leaders to maximise their chance of winning the next presidency, the latter have constantly mobilised their own party mostly to struggle against the former. Under DJ and HC, the opposition parties not only frequently refused to reach an agreement on disputable issues via ordinary political processes, but also took to the street in order to protest against the incumbent president (*Hangyeore Sinmun* 3 September 1996; *Gyeonghyang Sinmun* 4 November 1999; 16 September 2004). On the other side, the ruling party would also be strongly subordinate to the president, at least until his 'lame duck' period. Then, the South Korean Presidents have enforced the ruling party, not to cooperate with opposition parties, but to stand against them. Particularly under a unified government, a president often tyrannically disregarded his oppositions by mobilising the disciplined ruling party. For example, the ruling parties have attempted to pass legislation, secretly and unilaterally, several times under the president's command, ostracising opposition parties. As a result, the opposition parties have also devoted all their energy to block the attempts. Such a pattern of political polarisation has repeatedly appeared in every president's period after democratisation. In addition, even a scuffle has often broken out between the legislators of ruling and opposition parties in the process of these polarised conflicts (*Donga Ilbo* 3 December 1993; 27 December 1996; *Hanguk Ilbo* 25 July 2000; *Hangyeore Sinmun* 13 March 1995). In other words, an immoderate political competition has been deepened in a vicious cycle. Not a day goes by where a trouble between the ruling and opposition parties is not reported in South Korea.

Hence, the extreme political competition has been constructed as a constant in South Korea after democratisation. Considering that the political conflict is severe, if a political faction loses moral legitimacy as the members are involved in criminal proceedings, the other factions will be able to get a large reflection benefit. Above all, political funds are passed around structurally because of the party bosses' monopolistic authority to nominate the candidates for membership of the National Assembly, which means that a number of politicians would become vulnerable to criminal proceedings, irrespective of ruling and opposition parties. Moreover, the probability that a South Korean President and his family or inner-circle members would be involved in corruption scandals is relatively higher, also because of the executive bureaucrats' partisan support, at least for the president's short-term initiatives. In practice, such corruption scandals involving the presidents' circle and especially their sons have been repeatedly revealed, albeit in the last phase of their tenure

(Chang, Park and Yoo 1998: 739-741; Jaung 2010: 223-228). Consequently, both ruling (presidential) and opposition parties could not help being tempted to abuse the civil-law prosecutors' wide power over criminal procedure, in order to delegitimise their political enemies. However, the most important point is that an incumbent president can enjoy an absolute priority both in politicising criminal justice against his political enemies and in protecting himself, via the civil-law prosecution service, during most of his tenure in South Korea after democratisation. The next parts examine the prosecutors' loyalty and betrayal towards an incumbent president, along with presidential electoral cycles, through empirical cases during President YS's and DJ's periods.

3. 2. 2. The cases in President YS's period

In December 1992, YS defeated DJ and Ju-yung Jung (the founder of the largest South Korean business group, Hyundai²¹), and finally won the presidency. He obtained 42% of the popular votes. It was too hard for DJ, who still relied mostly on his hometown, Jeolla-do, to overcome YS, who already made an inter-regional coalition with the authoritarian heirs, by integrating Democratic Justice Party (DJP), the Reunification Democratic Party (RDP), and New Democratic Republican Party (NDRP) into a new huge ruling party, Democratic Liberal Party (DLP), in December 1990, and consequently could acquire the unquestioning support from Chungcheong-do, and North and South Gyeongsang-dos in the presidential election (Shin 1999: 199-200).²² DJ made a good fight in Seoul, but his share of entire votes was only 33.8%. Although Ju-yung Jung also unexpectedly acquired a considerable part of total votes, relying on his fresh image, the enormous amount of cash and the organisational power of Hyundai Group, he obtained just 16.3%, because of the absence of a regional base (Kang 1998). Immediately after the presidential election, DJ announced his official retirement from domestic politics, and left to the University of Cambridge in the U.K. for designing new plans. However, Ju-yung Jung had no choice but to fear that his business group would suffer a disadvantage under the new president, because of his challenge to YS. By contrast, YS received the approval rating of 90% in a poll, as the first civilian president in South Korea after democratisation (*Donga Ilbo* 23

²¹ For the South Korean big businesses referred to as *Chaebols* and their relations with politics, see Amsden (1989); Kim (1997); Kang (2002), and so forth.

²² This event was called as the 'Integration between Three Parties' in which YS's RDP, Jong-pil Kim's NDRP (the former Jung-hee Parks' faction), and the incumbent President Tae-woo Roh's DJP (the former Doo-hwan Chun's faction) participated in. As a consequence, DJ's Peace Democratic Party was completely isolated before the presidential election.

February 1998: 5).²³ At that time, he really seemed to be able to do everything.

In fact, YS did not need too much to politicise criminal justice against his political enemies, at the beginning of his term, by utilising the civil-law prosecution service, because he not only enjoyed the extremely high popularity, but also dominated the absolute majority party in the National Assembly. Nonetheless, YS wanted to consolidate his political authority, by teaching the challengers a bitter message, and correspondingly commenced a threatening revenge against them through the use of the enormous power of the prosecution service. Ironically, DJ and his faction could be relatively less oppressed by the prosecution service at that time (*Donga Ilbo* 12 January 1993). This can be assumed because DJ declared his official retirement from domestic politics, leaving to the U.K., and YS trusted his decision. Moreover, given that YS and DJ had resisted the authoritarian regimes together for a long time, a pointless attack on the departed might impose a considerable political burden on the new president. Thus, YS's aggression was rather concentrated on Ju-yung Jung. It is well known that Hyundai Group was unusually discriminated in financial and tax issues, when compared with other big businesses, during YS's period. Not only were commercial banks reluctant to offer an industrial loan, but the tax service also often conducted a special tax audit of this huge corporation. Undoubtedly, these were because of YS's political hostility towards Ju-young Jung (*Donga Ilbo* 15 April 1998).

However, Hyundai Group was suppressed most violently by the prosecution service in the former phase of President YS's period. Immediately after the presidential election, Ju-yung Jung's sixth son, the legislator Mong-joon Jung, was prosecuted on the grounds that he had ordered an illegal wiretapping in the course of the presidential election. Although the wiretapping revealed that some top-ranking state officials in the power organs, such as the police agency, the prosecution service, and the military, were planning to manipulate the election in favour of YS, the prosecution service only made an issue of the wiretapping (*Gyeonghyang Sinmun* 30 December 1992). In addition, more than 20 members of Ju-yung Jung's inner-circle, including directors of Hyundai Group and core political aides, were also indicted at once. Eventually, Ju-yung Jung himself was forbidden from leaving the country, and even prosecuted. Though there were some critics of the prosecutors' partisan

²³ Although Seung-man Lee, the first elected president (1948-1960) after the Korean independence from Japan in 1945, was also a civilian president, he could not be regarded as a pure civilian since he not only plotted unfair elections but even illegally attempted to obtain his permanent tenure. The second Korean President Bo-sun Youn (1960-1962) could also not be understood to be a civilian president, because he was the symbolic head of state under the parliamentary system in the Second Republic of Korea. After these two presidents, no civilian had occupied the Korean Presidency until 1992 when YS became president.

behaviour against him, he had to stand before the court as many as 12 times on various counts of fraud during YS's period (*Donga Ilbo* 11 March 1998: 7). Expectedly, most of the top-ranking prosecutors, such as Doo-hee Kim (the prosecutor general) and Tae-jung Kim (the head of the CID), who were leading the prosecution service during this time, could get promoted to a upper rank or obtain a ministerial post within YS's tenure, even though courts did not declare all the suspects guilty. That is, YS obviously misused the prosecution service as a political weapon through his control over the prosecutors' career, and consequently succeeded in retaliating against Ju-yung Jung and destroying his political potential completely, although Hyundai Group did not go bankrupt.

However, the most dramatic incident in which YS tried to abuse the civil-law prosecution service as a political weapon against his political enemy was in the criminal proceedings against Chul-un Park. As Chul-un Park was one of President Tae-woo Roh's close relatives, he wielded a massive influence on politics, to the extent that he was called as the 'Little Prince,' during President Roh's period. According to Chul-un Park's own memoir (2005), the relationship between him and YS had aggravated over the years, although they had once cooperated with each other to hold the negotiations for combining the DJP and RDP to the DLP in 1990. However, the conflict between the two was preordained, because YS intended the merger of the parties only to acquire the presidential candidate of a majority ruling party, whereas the DJP had more interests in changing the then presidential system to a parliamentary one than in faithfully supporting YS as the candidate (Oh 1999: 116-117; Steinberg 2000: 215). YS was quite sure that he could easily be inducted to the presidential candidate of the huge ruling party, but he repeatedly encountered obstacles in the process of winning the candidacy, owing to Chul-un Park's tenacious resistance. Above all, Chul-un Park vigorously denounced YS for the reason that he never kept his promise to adopt a parliamentary system. As YS never agreed on any constitutional amendment, Chul-un Park was in the forefront of supporting the other presidential contenders such as Jong-chan Lee or Tae-joon Park within the DLP. In addition, when YS officially became the presidential candidate of the DLP, he left the ruling party with some legislators, and even joined Ju-yung Jung's Unification National Party for blocking YS's victory (*Gyeonghyang Sinmun* 14 October 1992; *Hangyeore Sinmun* 28 November 1992). Eventually, YS obtained the presidency, after a lot of hardship, in December 1992, but he could not easily forget Chul-un Park's persistent challenges.

It is widely known that YS personally ordered the Seoul District Prosecutor's Office to

institute a criminal proceeding against Chul-un Park from the very beginning of his tenure (*Hanguk Ilbo* 19 September 1998). Again, the prosecution service was abused as a political instrument for the president. Initially, the presidential administration procured some files about Chul-un Park's slush fund and handed these over to the Seoul District Prosecutor's Office. Relying on the files, the prosecutors investigated him during about 10 months. Nonetheless, the first attempt of YS to prosecute Chul-un Park failed. According to the announcement of the prosecution service, he had not received so much secret money to the extent of getting indicted. It was also reported that a low-ranking prosecutor had resisted the political order from President YS. Anyway, this "planned" criminal proceeding was terminated as only one of Chul-un Park's close allies was indicted. However, YS did not abandon to plot against his political rival. Before long, a superior prosecutor, Joon-pyo Hong detected Chul-un Park's illegal activities while conducting criminal proceedings against a mafia boss's slot machine business (*Donga Ilbo* 4 February 1998). Meanwhile, the press also continuously raised doubts about improper exchanges between Chul-un Park and the mafia boss, and therefore his corruption scandal quickly arose as a sharp political issue. Finally, Chul-un Park was prosecuted by Joon-pyo Hong (*Gyeonghyang Sinmun* 15 December 1997).

<Table 3-1> The Prosecutors General in President YS's Period

| Name | Service Period | Main Previous Career | Next Position |
|----------------|------------------------------------|--|------------------------------------|
| Doo-hee Kim | December 1992 – March 1993 | - Deputy Prosecutor General - Deputy Minister of Justice | - The Minister of Justice |
| Jong-chul Park | March 1993 – September 1993 | - Deputy Prosecutor General - The Head of the CID | |
| Do-un Kim | September 1993 – September 1995 | - Deputy Prosecutor General - The Chief of Daejun High Prosecutor's Office | - 15th National Assembly Member |
| Ki-soo Kim | September 1995 – August 1997 | - The Chief of Seoul High Prosecutor's Office | |
| Tae-jung Kim | August 1997 – DJ's period | - Deputy Minister of Justice - The Head of the CID | - The Minister of Justice |

But this consequence in which not a top-ranking but mere young prosecutor indicted the president's political enemy seems to counter to the framework of this thesis. However, it might be quite difficult for prosecutors to initiate criminal proceedings against Chul-un Park, considering that he had once worked as a top-ranking prosecutor. In addition, the

current Chief of the Seoul High Prosecutor's Office, Gun-ge Lee, was also involved in this criminal case. In reality, more than a few prosecutors campaigned to save Gun-ge Lee. In this exceptional case, therefore, President YS would have a difficulty in exploiting the prosecution service hierarchically and consequently encourage a low-ranking prosecutor to politicise criminal justice. Perhaps, the failure of YS's first attempt can also be explained in the same context. At any rate, Chul-un Park was taken into imprisonment. By contrast, Joon-pyo Hong could acquire the legislative membership in 1996, under President YS's special care, though he could no longer get promoted to an upper rank on the grounds that he dared to indict the former and current top-ranking prosecutors (*Gyeonghyang Sinmun* 12 January 1998: 15).

On the other hand, as DJ unexpectedly made his comeback to domestic politics before the 1996 National Assembly election, prosecutors immediately targeted him. However, this was a little different from the above cases, in the respect that YS aimed to hinder the political participation of his old rival, rather than merely to carry out political retaliation. The prosecution service launched to investigate DJ and his political faction, when he went ahead with building a new political party, the NCNP. In particular, Asia-Pacific Peace Foundation, DJ's research organisation, was intensively investigated for receiving a large amount of illegal donation, and consequently two suspected politicians were prosecuted (*Donga Ilbo* 1 September 1995). A controversy over the prosecutors' partisan manner could not help arising, because they did not focus on the politicians belonging to the ruling party but only on the members of DJ's faction, with perfect timing. Above all, though the suspicion of a senior presidential aide who might be involved in corruption also arose on those days, prosecutors ignored this case while focusing only on the criminal investigations against DJ's faction (*Gyeonghyang Sinmun* 24 March 1996: 3). YS claimed to advocate the eradication of corrupt politicians under the rule of law, but he was broadly suspected to instigate the prosecution service to attack his political opposition with a partisan intention (*Hangyeore Sinmun* 1 September 1995).

Although the prosecution service failed in indicting DJ himself or his core members via the criminal proceedings, it achieved a valuable political result for President YS. First of all, prosecutors could notably decrease the public support for DJ's political comeback. The press also played an important role, by widely reporting about the probability of DJ's corruption, along with the criminal proceedings. Moreover, the NCNP became less active to collect political donations owing to the prosecutors' pre-emptive inspection, and hence

the party suffered from serious insufficiency of political funding right before the 1996 National Assembly election (*Donga Ilbo* 3 December 1995). As a result, DJ could not avoid a definitely poor record in the election, despite his political “all in.” Considering that the NCNP won much less legislative seats than the ruling party, New Korea Party (NKP)²⁴, the politicisation of criminal justice prompted by the alliance between YS and prosecutors could be regarded to have a considerable effect on the then democratic process.

However, YS’s strong domination over prosecutors was eased, as his presidential tenure was going to end. The case of corrupt relationship between politicians and Hanbo Group, one of the South Korean big businesses, could be understood to demonstrate the dynamic of the prosecutors’ betrayal against President YS in the last phase of his tenure. In January 1997, this case began as Hanbo was in the crisis of bankruptcy due to its overinvestment in steel industry. Then, the problem was that this business group raised most of the funding for the investment, through an immoderate amount of bank loans as much as about USD 3 billion. Suspicions could not help but arise about the privileged loans for Hanbo. It was thought that some heavyweights in the president’s circle might enforce commercial banks to support the exceeded loans to Hanbo (*Donga Ilbo* 25 January 1997). Therefore, the CID opened a criminal investigation, focusing on the owner-manager of Hanbo Group, Tae-soo Jung, and his lobby towards politicians in order to obtain illegal regulatory and financial conveniences for his business. Incidentally, the result of the investigation by prosecutors was somewhat strange. At first, the prosecution service seemed to reach the core of the president’s faction, given that one of YS’s closest allies, In-gil Hong, was indicted. Nonetheless, there were no more indicted politician in the president’s faction, but among the members of DJ’s faction, his first political ally, No-gap Kwon, was indicted. Thus, the prosecution service was widely suspected to intentionally give impunity to real criminals within the president’s clique, such as YS’s son, Hyun-chul Kim (*Hangyeore Sinmun* 14 February 1997). In particular, the fact that a key politician of DJ’s faction was also charged fuelled the suspicion on the prosecutors’ partisan manner. Then, the press also intensified public doubt by directly mentioning Hyun-chul Kim. By nature, the opposition parties were strongly urging the prosecution service to reinvestigate the case more impartially. Even HC who began to keep distance himself from the current President YS, as the new leader of the ruling party, also advocated the reinvestigation (*Gyeonghyang Sinmun* 14

²⁴ Before the National Assembly election in 1996, Jong-pil Kim (JP) and his faction left the ruling party (DLP) to create his own party, United Liberal Democrats (ULD), whereas President YS rebuilt the ruling party, changing its name from the DLP to the NKP.

March 1997).²⁵

At that time, the prosecution service also stopped demonstrating loyalty to President YS. Numerous low-ranking and middle-ranking prosecutors already began to make demands on the top rankers for fair criminal proceedings against the president's faction (*Donga Ilbo* 16 March 1997; *Gyeonghyang Sinmun* 17 March 1997). A few top-ranking prosecutors might have wished to give immunity to Hyun-chul Kim, but they could not disregard other top rankers' and lower rankers' requests for the separation from the outgoing president. YS could no longer dominate the prosecution service. After all, Jae-ryun Shim, who had been well regarded as an upright prosecutor was newly appointed to the head of the CID (*Donga Ilbo* 22 March 1997). Although YS would not have wanted Jae-ryun Shim, he had no choice but to respond to the negative public opinion by choosing a depoliticised figure. As suggested by Hypothesis I-1, Hyun-chul Kim was eventually prosecuted, in charge of his illegally collecting political funds, about 6 months before President YS's retirement, while neither his connection to Hanbo was clearly found nor the reasons of his indictment was obvious.²⁶ Rapidly, the Head of the CID Jae-ryun Shim arose as a national hero, and the prosecution service recovered public trust owing to its indictment of the incumbent president's son. Yet this prosecutors' activity could not be recognised as a politically impartial behaviour but as a strategic choice, given that the prosecution service had long sustained a partisan position in favour of YS until then. In sum, the prosecution service, which had served President YS during most his tenure, betrayed him in his last phase, and therefore the president could not avoid a serious 'lame duck' season, in accordance with Hypothesis I-1 of this thesis.

3. 2. 3. The cases in President DJ's period

In December 1997, DJ at last won the 15th Korean President. This was the result of his forth challenge for presidency. DJ only narrowly defeated HC, albeit public hostility to the incumbent government, due to a serious economic crisis, and an electoral coalition of the NCNP and the ULD, which had feature of the inter-regional coalition between DJ's party

²⁵ In order to win the next presidency, HC changed the name of the ruling party, from the NKP into the GNP, and strongly requested President YS to leave the party.

²⁶ Hyun-chul Kim has consistently insisted that the prosecutor's office had not only intentionally initiated but even manipulated criminal proceedings to indict him by any means. More importantly, his lawyer also testified that the prosecution service had obviously perverted criminal proceedings against Hyun-chul Kim in a partisan manner, while acknowledging that he had deserved to be criticised (*Sisaoneul* 15 December 2010).

based on Jeolla and JP's one based on Chungcheong (Kang and Juang 1999: 600-603).²⁷ However, the NCNP still occupied only about one third, and even the ruling coalition bloc also remained as a minority, in the National Assembly.²⁸ By contrast, the GNP was still the majority party in the legislature, although HC announced the complete retirement from domestic politics. Thus, it could easily be assumed that President DJ would be tempted to judicialise politics by abusing the prosecutors' extensive power over criminal procedure as a political weapon.

In fact, DJ benefited from the prosecution service even in the presidential election itself. This case began as a legislator of the GNP revealed that DJ had collected an illegal secret fund, just two months before the presidential election. DJ flatly denied this doubt, but it is no exaggeration to say that the result of the 1997 presidential election *de facto* depended on prosecutors' choice. If they had then initiated a criminal proceeding against DJ, he would have struggled under the circumstance of a seriously judicialised politics and lost the election, regardless of the authenticity of the suspicion, considering that he won the presidency by a narrow margin. However, the prosecution service decided to postpone the investigation, on the grounds that the criminal proceeding might improperly influence the presidential election and could not be completed before the election (*Gyeonghyang Sinmun* 22 October 1997). The current President YS was also suspected to support DJ indirectly by instructing the prosecution service to defer the criminal proceeding, since HC vigorously asserted that YS's son should be prosecuted. However, considering that YS no longer had enough power to dominate prosecutors, they could be understood to make such a decision voluntarily because of the uncertainty of who would gain the new presidency. Thus, it can be said that the prosecution service was not really impartial, but strategically pretended to be impartial, as proposed by the framework of this thesis. Unsurprisingly, the top-ranking prosecutors who made the decision could get advanced to a more prominent post, after DJ's rise to presidency. For example, Prosecutor General Tae-jung Kim and the Head of the CID Soon-yong Park were appointed to the minister of justice and prosecutor general, respectively, in 1999 (*Gyeonghyang Sinmun* 26 May 1999). Along with DJ's presidential inauguration, the case of his illegal political fund was not only closed by the prosecution

²⁷ On the other hand, the suspicion that HC's two sons had been illegally exempted from their military duty during his position as senior judge, and the Governor of Gyeonggi-do In-je Lee's defection from the GNP and running for the presidential election as the third candidate were also considered main factors to lower HC's voting rate (Kim 2000: 175-176).

²⁸ However, the political coalition between the NCNP and the ULD could increase the number of their legislators from 122 to 153 (more than an absolute majority) in September 1998, by actively taking the legislators of the opposition party, GNP, after the triumph of the 1997 presidential election (Shim 2004: 457-458).

service but the quarrel over the suspicion was also silenced, although there might have substantially been his secret fund (*Hangyeore Sinmun* 24 February 1998).

Also in DJ's period, the prosecution service played a critical role in the judicialisation of politics by initiating criminal proceedings against the president's political oppositions. In particular, the prosecutors' partisan attitude was exposed through their investigation and indictment against core members of HC's faction. In September 1998, prosecutors openly began to investigate a criminal case, in which HC was suspected of collecting a massive amount of illegal political funds via the National Tax Service, by prohibiting one of HC's close allies, Sang-mok Seo, from leaving the country (*Donga Ilbo* 1 September 1998). If this were proven to be true, it was a serious crime. However, considering that HC returned to the leader of the GNP in August 1998, the perfect timing could not help but raise a deep suspicion of any partisan intention of the criminal proceedings, though DJ declared that prosecutors should only pursue the rule of law in dealing with this serious criminal case (*Donga Ilbo* 8 September 1998: 5). Some media announced that the CID had long assumed that HC's brother, Hoi-sung Lee, might put pressure on the tax service to collect the political funds from big businesses for HC's triumph in the presidential election (*Donga Ilbo* 3 October 1998; *Hangyeore Sinmun* 9 October 1998). Eventually, Hoi-sung Lee was indicted in December 1998, although this criminal case could not be completely examined because of the previous vice-chief of the tax service's flight to the U.S. In the criminal proceedings, the prosecution service could not succeed in indicting HC himself, but the indictment of his brother was enough to weaken his political influence. In addition, the prosecutors damaged his moral foundation by carelessly revealing irrelevant newsworthy stories about this case to the press (*Hangyeore Sinmun* 8 February 1999). Later, the Head of the CID Myung-jae Lee who had actually led the criminal proceedings got advanced to prosecutor general within DJ's tenure.²⁹ Furthermore, prosecutors even reopened this criminal case, before the National Assembly election in 2000, perhaps in favour of the president's faction (*Hangyeore Sinmun* 31 July 1999).³⁰ As a result, HC had to release a

²⁹ However, Myung-jae Lee worked relatively impartially as the chief of the prosecution service rather than other prosecutors general under President DJ, according to a white paper of the People's Solidarity for Participatory Democracy (Chamyeoyeondae 2003). In actuality, Prosecutor General Myung-jae Lee decided to indict President DJ's inner-circle members, albeit in the last phase of DJ's tenure. Thus, the criminal proceedings against HC's faction also seem to have been motivated by Prosecutor General Tae-jung Kim's loyalty to DJ rather than the Head of the CID Myung-jae Lee's political intention.

³⁰ Nonetheless, the GNP led by HC could still secure the simple majority of the legislative branch (133/273), due to the absolute regional support from North and South Gyeongsang, in the National Assembly election in April 2000. Although the ruling party (MDP) succeeded in obtaining almost 20 more legislative seats in this election (115/273) than before, it could not be regarded to win a signal triumph. This is because DJ could not yet overcome the political regionalism, and got damaged from the 'cloth lobby' scandal, which is explained

public apology exceptionally as a leader of the largest opposition party.

In May 1999, there emerged a large political scandal, where Hyung-ja Lee, the wife of the owner of a big business, Shindonga Group, bought so expensive clothes for some current ministers' wives in order to save his husband from legal punishments, and therefore DJ's government was unexpectedly faced with a political crisis. This was called as the 'cloth lobby' scandal. Given that the first lady was also doubted of being involved in this scandal, DJ would lose his moral legitimacy significantly, if this suspicion could not be resolved as soon as possible (*Hangyeore Sinmun* 26 May 1999). Accordingly, DJ announced that the investigative team of the presidential administration had already examined this case five months earlier, and the ministers' wives had been found innocent. However, the suspicions did not completely disappear, and HC and his GNP strongly denounced that the president's faction was covering up the case, as if they got a chance to counterattack to President DJ.

Thus, the prosecution service began reinvestigating this big scandal (*Gyeonghyang Sinmun* 28 May 1999). However, prosecutors could not be trusted by the public from the beginning, because the Minister of Justice Tae-jung Kim (the former prosecutor general)'s wife was also deeply involved in the scandal. Many non-government organisations also pressured DJ to dismiss the Minister of Justice Tae-jung Kim (*Hangyeore Sinmun* 29 May 1999). Then, not surprisingly, the prosecution service simply closed these criminal proceedings, with the conclusion that Hyung-ja Lee had tried to buy the expensive clothes for Jung-sook Bae, the wife of the Minister of Unification (In-duck Kang), to pull the string of Jung-hee Youn, the wife of the Minister of Justice, but Jung-sook Bae had failed to persuade Jung-hee Youn, and therefore Hyung-ja Lee had not paid for Jung-sook Bae's clothes (*Donga Ilbo* 3 June 1999). Yet, the suspicion that the prosecutors intentionally covered up the case, in order to protect both the president's faction and the prosecution service itself, could not be resolved.

After even the legislative investigation for revealing the truth of the 'cloth lobby' scandal could not reach a satisfying outcome, the conclusion of the prosecution service was at last reversed by a temporarily appointed special prosecutor.³¹ The Special Prosecutor Byung-mo Choi found a fact that Prosecutor General Tae-jung Kim and Joo-sun Park, a senior prosecutor detached to the position of presidential secretary for legal affairs, had already conspired to defend Tae-jung Kim's wife, from the time when the investigative team of the

below.

³¹ For the introduction of a 'special prosecution system,' Chapter IV will explain more in detail in the context of reform against the civil-law prosecution service.

presidential administration had investigated this case (*Gyeonghyang Sinmun* 21 December 1999). It is still uncertain whether President DJ or his wife was actually involved in the case, because the special prosecutor could also find no corruption directly connected to them. Nevertheless, the special prosecutor at least uncovered the prosecutors' partisan manner as well as the improper collusion of the presidential administration and top-ranking prosecutors, in this big political scandal.

<Table 3-2> The Prosecutors General in President DJ's Period

| Name | Service Period | Main Previous Career | Next Position |
|----------------|---------------------------------|---|---------------------------|
| Tae-jung Kim | YS's period – May 1999 | - Deputy Minister of Justice - The Head of the CID | - The Minister of Justice |
| Soon-yong Park | May 1999 – May 2001 | - The Chief of Daegu High Prosecutor's Office - The Head of the CID | |
| Seung-nam Shin | May 2001 – January 2002 | - Deputy Prosecutor General - The Chief of Jeonju District Prosecutor's Office | |
| Myung-jae Lee | January 2002 – November 2002 | - The Chief of Seoul High Prosecutor's Office - The Head of the CID | |
| Gak-young Kim | November 2002 – MH's period | - Deputy Minister of Justice - The Chief of Seoul District Prosecutor's Office | |

However, the prosecution service in DJ's period seemed a little different from that in YS's period, in the aspect of its organisational unity. For instance, an incumbent chief of a high prosecutor's office³² publicly denounced that the other top-ranking prosecutors, who had came mostly from Jeolla-do, were excessively devoting their loyalty to the president, with the support of a considerable number of young prosecutors (*Donga Ilbo* 28 January 1999; *Gyeonghyang Sinmun* 29 January 1999). Moreover, quite a few top-ranking prosecutors, including the former Prosecutor General Tae-jung Kim, were even indicted by their own organisation during DJ's period. Considering that these were somewhat different from the prosecutors, who had been reluctant to institute criminal proceedings against former or current top-ranking prosecutors, in YS's era, the framework of this thesis may seem to face counterexamples. However, the then prosecutors – who went against the top rankers loyal to DJ – could not be recognised as purely fair, but only having done so because the loyal top-ranking prosecutors were suspected to help the president to reform the prosecution service, or their crime were already disclosed by special prosecutors. As Chapter IV will

³² Ironically, this prosecutor was the Chief of Daegu High Prosecutor's Office Jae-ryun Shim, who had brought the criminal proceeding against YS' son, Hyun-chul Kim.

explain in more detail, nonetheless, even the top-ranking prosecutors loyal to President DJ actually had no intention of supporting his reform against their own organisation, and the president also abandoned major reform plans against them after the ‘cloth lobby’ scandal. Instead, DJ more actively elevated the candidates who were loyal to him into top-ranking posts in the prosecution service (Chamnyeoyeondae 2003; Cho 2010: 98-107). As Table 3-2 shows, most of the heads of the CID who played a pivotal role in criminal proceedings against major politicians could get promoted to prosecutor general during his tenure. Thus, the alliance between President DJ and prosecutors could be sustained, even in the situation of divided government, until the last phase of his tenure.

Also in DJ’s period, however, the prosecution service betrayed the incumbent president in the last phase of his tenure. In spring 2002, the press began to report that DJ’s second and third son, Hong-up Kim and Hong-gul Kim, might be involved in large-scale corruptions. Hong-gul Kim was being suspected of keeping a cozy relationship with a lobbyist, Kyu-sun Choi, and of helping him illegally. As various criminal cases regarding Kyu-sun Choi’s corruption were consecutively revealed, Hong-gul Kim’s involvement also became a sharp political issue (*Hanguk Ilbo* 12 April 2002). Soon after, the prosecution service indicted the president’s third son. The prosecutors’ indictment should not be criticised, because even DJ admitted that his third son might be unintentionally involved in the corruptions (Kim 2011: 457-459). However, a remarkable point was always the perfect timing of the prosecution service. It seems unlikely that no top-ranking prosecutor had perceived the corrupt network between Hong-gul Kim and Kyu-sun Choi, given that the president’s faction had already known about the relation between them through a confidential report of the NIS in 2000 (*Gungmin Ilbo* 2 May 2002). But the prosecution service brought criminal proceedings against Hong-gul Kim in the last part of DJ’s term. Likewise, the prosecutors indicted DJ’s second son as well in his last phase, on the grounds that he had accepted bribes. However, the political intention of this criminal proceeding was suspected. Unlike the case of the president’s third son, DJ wrote, “Prosecutors unfairly charged my second son under the conviction that the GNP would win the next presidency” (Kim 2011: 459). In particular, the top-ranking prosecutors, who dominated the criminal proceedings against DJ’s sons, could show off their braveness and fairness, and correspondingly got promoted to a more influential post under the next presidency. In short, the prosecution service, which had devoted loyalty to President DJ during most of his tenure, turned away when he was outgoing, and consequently DJ could also not avoid the bitter season of ‘lame duck,’ in accordance with Hypothesis I-1 of this thesis.

3. 3. Summary

This chapter has sought to account for the frequent pattern of the politicisation of criminal justice under the institutional combination of presidentialism and a civil-law prosecution system, through an empirical analysis of the relevant cases during South Korean President YS's and DJ's periods. This was to test the validity of Hypothesis I-1 of this thesis: under the institutional combination of presidentialism and a civil-law prosecution system, if political competition is high and an incumbent president seeks to abuse the prosecutors' extensive power, they would manipulate criminal proceedings in favour of him during most of his tenure but betray him in his last phase.

As the first institutional precondition in a new democracy, South Korea, the prosecution service holds much wider power over criminal procedure than the equivalents of any other civil-law countries. Hence, the prosecutors could do almost everything arbitrarily at least in all the pre-trial stages of a criminal proceeding. In addition, the prosecution service has entailed a very strong organisational hierarchy. As the second institutional precondition, the 1987 Constitution thoroughly guarantees the presidential power to appoint his ministers and the chiefs of other power organs *de facto* autonomously from the other branches of government. In South Korea after democratisation, furthermore, state officials are still induced to demonstrate their loyalty towards an incumbent president and to serve his partisan policies, at least short-term initiatives, because the organisational hierarchy of the state bureaucracy is not only strong, due to the legally-formal and impersonal mechanism in its career system, but the president also customarily elevates senior bureaucrats into ministerial-level positions. In this way, prosecutors are also induced to demonstrate their loyalty to an incumbent president during most of his tenure. Therefore, the institutional combination of these two preconditions makes an incumbent president able to exclusively abuse the prosecutors' far-reaching power.

In South Korea after democratisation, meanwhile, the serious political polarisation between the presidents' faction and the opposition forces has constantly been brought, because the political regionalism intensifies the probability of political conflict caused by a strong presidency itself. In this circumstance, President YS and DJ repeatedly promoted their loyalists to top-ranking prosecutors, and misused this power apparatus in favour of them but against their political opponents during most of their tenure. However, both of them

could not avoid the defection of the civil-law prosecution service, and consequently could not keep prosecutors from indicting their sons in the last phase of their term, in accordance with Hypothesis I-1 of this thesis.

Chapter IV: Presidents' reform of the prosecution service, and the politicisation of criminal justice in South Korea

This chapter aims to explain why major reform of the prosecution service cannot easily be achieved under the institutional combination of presidentialism and a civil-law prosecution system, by examining some empirical cases in South Korea after democratisation. Indeed, an incumbent president would more frequently seek his short-term interest in misusing civil-law prosecutors for the politicisation of criminal justice, than his long-term interest in reforming against them. The empirical cases of Chapter III already demonstrated the utility of a civil-law prosecution service as a political weapon for an incumbent president. Hence, according to Hypothesis I-2 of this thesis, an incumbent president is likely to abandon the reform soon, not daring to go against the prosecutors but being satisfied with abusing them as an instrument, though he would temporarily intend to curtail the enormous power of a civil-law prosecution service. On the other hand, according to Hypothesis II of this thesis, under this institutional combination, if political competition is high and an incumbent president does not abandon large-scale reform against prosecutors, they would institute criminal proceedings even against him not in the last phase but from the beginning of his tenure, and consequently his reform would fail. To test these two hypotheses, first of all, this chapter explains why no radical reform to curtail the civil-law prosecutors' enormous power would be launched, or at best some minor changes to their power bases could be attempted and achieved, through empirical analysis of some cases during President Young-sam Kim (YS)'s and Dae-jung Kim (DJ)'s periods in South Korea. Secondly, this chapter explains why an incumbent president could not succeed in major reform of a civil-law prosecution service, despite his repeated attempts to curtail the prosecutors' great power, via an empirical analysis of some cases during President Moo-hyun Roh (MH)'s period in South Korea.

4. 1. Insignificant reform of the civil-law prosecution service in South Korea after democratisation

4. 1. 1. No large-scale reform of the prosecution service in President YS's period

In December 1992, YS took the first Korean Presidency after democratisation. As stated above, though Tae-woo Roh, YS's immediate predecessor, also obtained the presidency via a popular election in 1987, he was not only a former military general but even the political heir of Doo-hwan Chun's authoritarian regime. Therefore, YS could be understood *de facto* as the first civilian president in South Korea. But, as discussed above, the power bases of a civilian president cannot help being different from those of authoritarian leaders. Under the special conditions of the Cold War and the division of Korea into South and North, the authoritarian presidents made use of military force and intelligence agencies to suppress and destroy political and social oppositions coercively. By contrast, a civilian president can no longer assertively use their physical and intelligence capacities for political manoeuvres, after democratisation, than the authoritarian rulers (Choi 2002: 80; Juang 2010: 31). The physical functions and ideological legitimacy of the intelligence agencies as a political weapon have been undermined to some degree, since the conditions of the Cold War and corresponding public anti-communism were eased, along with democratisation in South Korea. The National Intelligence Service (NIS) or intelligence agencies in the military still play their own duties under the division of the Korean Peninsula, but a president can no longer easily exploit these apparatuses to destroy his political oppositions by branding them as communist rebels. In addition, President YS voluntarily removed a potential of the politicisation of the military, through a sweeping purge of current generals, right after his inauguration. Then, a number of military generals who had maintained a partisan spirit via a private network¹ were suddenly ousted from their post (*Gyeonghyang Sinmun* 17 April 1994; Oh 1999: 133-134). As a result, President YS could completely eliminate the risk of a military *coup*, but no longer arbitrarily misuse the physical and informational capacities of the military.

In parallel with the decline of such power organs, the prosecution service arose as the most influential coercive apparatus in South Korea (Han 2000: 204-205; Kim, Seo, Oh and Ha

¹ Both the previous Presidents, Doo-hwan Chun and Tae-woo Roh, had also once belonged to this private network, 'Hanahoi,' during their military service.

2011: 116). The South Korean Prosecution Service, inheriting a strong type of civil-law prosecution system, held far-reaching power over criminal procedure, but its function and legitimacy was less damaged, and even recognised as virtually the only rightful coercive body because it could, at least superficially, advocate the rule of law in the democratic era. Thus, an incumbent president could be more tempted to abuse the prosecutors' vast power, through his exclusive control over their career, for defeating his political enemies, than to come into conflict with them by launching to reform their prerogative powers. Certainly, President YS also seemed to have neither a specific idea nor strong will for reform of the prosecution service, given that such a plan was not contained in his main election promises (*Gyeonghyang Sinmun* 21 December 1992; *Hangyeore Sinmun* 9 January 1993). While YS, as the first civilian president, pushed for numerous reforms in political, economic, and social spheres (Hahm and Kim 1999), no institutional change of the prosecution service was pursued, even in the agenda of judicial reform. Several members of Democratic Liberal Party (DLP) argued that the president allow police officers the prime investigative authority for at least a few kinds of crimes through a change in the Criminal Procedure Act, but he attempted no reform against prosecutors during his tenure (Lee 2005b: 166).

Instead, President YS sought his short-term interest in misusing the civil-law prosecutors as his own political weapon, in the situation that he could no longer exploit the other power organs. In a sense, a strong prosecution service might have been required for the effective punishment of political criminals benefiting from the authoritarian regimes. However, the empirical cases of Chapter III clearly demonstrate that YS attempted to actively assault his political enemies, through the politicisation of criminal justice. Thus, the prosecutors who were capable but loyal to him got promoted to the top-ranking positions during his tenure. Most of all, YS might be unable to predict that they would betray him in the last phase of his tenure, since the *de facto* first civilian president had experienced only the prosecutors subject to the dictators during authoritarian era. He could become aware of the possibility of the prosecutors' defection, at the moment when his son, Hyun-chul Kim, was prosecuted. Hence, it can be said that President YS could hardly perceived his long-term interest in curtailing the civil-law prosecutors' enormous power. In actuality, he made no attempt to reform the civil-law prosecution service during his tenure. Even an assessment that little personnel lustration was undertaken for this organisation, unlike the extensive renewal of high-ranking military personnel, was dominant (*Hangyeore Sinmun* 15 September 1993).

In President YS's period, by contrast, the largest opposition party strongly pursued reform

against the prosecution service. As explained in Chapter III, the prosecutors' institution of criminal proceedings against YS's political oppositions was taken from the beginning of his term. In May 1994, Democratic Party (DP)² officially criticised the politicisation of prosecutors for the first time, announcing that the prosecution service was playing the role of political manoeuvres which had been committed by the intelligence agencies in the past (*Donga Ilbo* 18 May 1994). However, prosecutors could easily neglect its reasonable request for their political neutrality, let alone the demand for any institutional reform against them, because the opposition party did not even hold control over their careers, unlike President YS. Moreover, the DP was only a minority party in the National Assembly. Although DJ made his comeback to domestic politics for the 1996 legislative election, the prosecution service continuously brought criminal proceedings only against the opposition parties, especially DJ's NCNP, while supporting President YS. Consequently, as explained in Chapter III, the NCNP could not make a good performance in this election, obtaining much less legislative seats than the DLP.

Before and after this defeat of legislative election, DJ could not help but fully realise the necessity of reforming the South Korean Prosecution Service. In fact, DJ had a serious distrust toward prosecutors, since he, as a leading dissident leader, had long suffered from them under the authoritarian regimes. Thus, the NCNP began to insist on building an independent body, which would control the prosecutors' careers, and adjusting the power distribution between prosecutors and police officers through an amendment of the current criminal procedure (*Hangyeore Sinmun* 8 July 1996). In particular, as the NCNP had already included the transfer of independent investigative power on minor crimes from prosecutors to police officers in its main promises for the 1996 legislative election, the party tried to revise the Criminal Procedure Act for this promise, with Jong-pil Kim (JP)'s United Liberal Democrats (ULD), in the 15th National Assembly (*Hangyeore Sinmun* 12 September 1996). Given that the South Korean prosecutors exercise more extensive power in criminal proceedings than the counterparts of any other civil-law country, DJ's plan to deprive the prosecution service of a part of its power to control criminal investigations was a reasonable option aiming at its partial transformation into a common-law system based on the decentralised criminal justice system.

² As described before, since DJ came back from the U.K. to South Korea and built his new party, National Congress for New Politics (NCNP), the majority of legislators in the DP voluntarily moved to DJ's new party. Eventually, the downsize DP combined itself with Grand National Party (GNP) immediately before the 1997 presidential election.

In July 1997, however, the NCNP suddenly made a decision to put off the adjustment of investigative powers over criminal procedure to the end of the year, while some legislators belonging to DJ's faction, who had careers in the prosecutor's offices, opposed the reform.³ Dong-young Jung, the spokesman of the NCNP, officially announced that his party made the decision because prosecutors were suspecting DJ's intention to tame them before the presidential election in December 1997 (*Gyeonghyang Sinmun* 24 July 1997; *Hangyeore Sinmun* 24 July 1997). Then, a notable point is the subtle change in relationship between the prosecution service and DJ right after the NCNP had abandoned its bill for a partial transfer of the ultimate investigative power to police officers. First of all, while President YS could no longer dominate even top-ranking prosecutors after the criminal proceeding of his son, a top-ranking prosecutor who originated from DJ's hometown (Jeolla), Tae-jung Kim, got appointed to new prosecutor general in August, which was favourable for DJ rather than for his rival, Hoi-chang Lee (HC) (*Donga Ilbo* 8 August 1997).⁴ In October, moreover, the GNP revealed that DJ might have a huge hidden fund, but prosecutors decided to bring no criminal proceeding against him (*Gyeonghyang Sinmun* 22 October 1997). If the prosecution service began to investigate DJ's secret money, he could not have won the presidency, despite his high probability of winning. It is still uncertain whether the prosecutors urged DJ to abandon his plan to change the criminal procedure, even before the disclosure by the GNP in October, in return for their jump on the front runner for the next president. However, it is undoubtedly true that DJ who had only a few months to run for presidency already felt an immense burden, because of the prosecutors' explicit discontent at his attempt to reduce their great prerogatives, in July. As a result, DJ would have no choice but to pull out of his endeavour to reform the prosecution service, without giving a reason for the withdrawal.

This section confirms that any political faction would have difficulty in launching reform against prosecutors, if political competition is high and an incumbent president seeks to abuse the prosecutors' enormous power, under the institutional combination of a civil-law prosecution system and presidentialism, in accordance with Hypothesis I-2 of this thesis. Most presidents are likely to attempt no reform of the prosecution service or to easily abandon it, because they would be more frequently tempted to satisfy their short-term interest in the politicisation of criminal justice in favour of them. President YS also launched no reform against the civil-law prosecutors during his incumbency. By contrast,

³ Then, the most important legislator with a career in the prosecution service was Sang-chun Park. Later, he got appointed to the first minister of justice in the DJ government.

⁴ Afterwards, Tae-Jung Kim, as expected, devoted strong loyalty to President DJ. See Chapter III.

opposition parties would have a stronger incentive to attempt reform of a civil-law prosecution service in order to restrain the politicisation of criminal justice against them, than a president. However, the opposition parties which possess almost no way to control over the prosecutors are inevitably much more vulnerable to their manipulative power over criminal procedure than a president, considering that a civil-law prosecution service can selectively target the reformist forces. Thus, DJ was also bound to abandon major reform against the prosecution service before the presidential election, and *de facto* due to this choice, he could narrowly win the presidency in December 1997.

4. 1. 2. Major reform attempts but minor changes of the prosecution service in President DJ's period

President DJ was no less important than the first civilian President YS, because he won presidency, for the first time as a candidate not from a ruling party but from an opposition party, in the 1997 presidential election. Since a fully new ruling force began to dominate the executive branch – although DJ made an inter-regional coalition with a former-military faction, JP's ULD, in order to win presidency –, the new president had a number of tasks ahead of him. At the time, moreover, economic crisis was as serious as the South Korean Government had to be given a large-scale relief loan from International Monetary Fund (IMF), right before DJ's inauguration. In this situation, President DJ declared to conduct even more comprehensive reforms throughout political, economic and societal spheres, when compared with the reforms of YS, for the dual developments of market economy and democracy (*Donga Ilbo* 20 December 1997: 3; *Hangyeore Sinmun* 20 December 1997: 1). In respect of the market economy, President DJ could not help carrying out reforms on the basis of neoliberalism under strong pressure from the IMF. Accordingly, he adopted four specific programmes, such as reforms of government, banks and finances, big businesses (*chaebols*), and labour (*Maeil Gyeongje* 7 February 1998). The programmes were aiming to downsize the government, to raise efficiency of the banking industry, to increase the competitiveness of *chaebols* through an intensive restructuring, and especially to intensify the flexibility of the labour market (Leem 2001). Although the approach of these reforms was based partly on the consensus between the government, big businesses, and labour unions, DJ himself – who had pursued a relatively progressive stance as a longstanding opposition leader – confessed that in the serious economic crisis, he had had no choice but to push for a reform strategy resulting in the wholesale discharge and job instability of workers, in his own memoir (Kim 2011: 19-27).

In regard of democracy and human rights, however, President DJ clearly took a progressive position. For example, DJ's government not only resolutely repatriated long-term prisoners to the North in September 2000, along with an engagement policy towards North Korea, but also established the Ministry of Women to enhance women's civil rights in January 2001 (*Donga Ilbo* 4 September 2000; *Hanguk Ilbo* 31 January 2001). Above all, DJ had a strong will to develop democracy and human rights via reform against law enforcement or coercive agencies, since he had undergone violence from them for long time. In particular, DJ had a deep mistrust of the prosecution service. Furthermore, the president might have realised the necessity of curtailment of the civil-law prosecutors' enormous power, on the grounds of the probability of their betrayal in the last phase of his tenure, since he had already witnessed their defection against President YS.

The attempt to introduce a 'regional autonomous police system' and its abandonment (December 1997 - June 1999)

In this context, DJ included a programme of reform of the prosecution service, which had been suspended for a while before the 1997 presidential election, in his major government projects again, along with winning presidency. This programme aimed to divide the police agency into central and regional offices through the adoption of a 'regional autonomous police system,' and to transfer investigative authority on some kinds of crimes, from the prosecution service, into the autonomous regional police offices (*Hangyeore Sinmun* 12 January 1998).⁵ This would have been a meaningful first step of institutional change in the then criminal procedure to a common-law system, and the beginning of a decrease in the massive power of the South Korean prosecutors. If criminal investigations into even a few kinds of crimes would be conducted by police officers without the control of prosecutors, the enormous power of the prosecution service in criminal proceedings was also bound to begin declining. In addition, President DJ created a provisional committee for reform of the prosecution service, and ordered it to discuss agendas for the political neutralisation of the prosecutors as well as the establishment of a human rights commission (*Hangyeore Sinmun* 13 January 1998; Gyeongjeonguisilcheonsiminnyeonhap 2000).

However, President DJ's will to reform the prosecution service, in particular to transfer a part of the investigative authority to police officers, began to weaken before long. Firstly,

⁵ Of course, the adoption of a 'regional autonomous police system' would not automatically give police officers the independent investigative power against some kinds of crimes. However, as these two changes interconnect with each other, President DJ also aimed to achieve the two at the same time.

attention must be paid to the fact that the prosecution service opened criminal proceedings against the close aides of HC, the leader of the GNP, in August 1998 – less than a year after DJ’s inauguration. As mentioned ever, prosecutors initiated a criminal investigation into them with a perfect timing, given that HC made a comeback to politics in that month. Soon, HC’s brother, Hoi-sung Lee, and one of HC’s closest allies, Sang-mok Seo, were indicted. The prosecutors’ behaviour was enough to raise suspicions of their partisan intention and corresponding selective criminal proceedings against HC’s faction. Moreover, prosecutors were criticised for damaging the presumption of innocence through the leak of newsworthy stories about the criminal case to the media (*Hangyeore Sinmun* 8 February 1999). The partisan attitudes of the prosecution service were not disadvantageous for DJ, because the new president could show off his power, regardless of his real intention, at the beginning of his term. While the ruling bloc narrowly managed a simple majority, relying upon the coalition with JP’s ULD, in the National Assembly, DJ’s NCNP was still a minority party and consequently the legislature had the potential of a strong veto player against the president. If so, the indictment of some HC’s close allies, especially his brother Hoi-sung Lee, could provide an excellent chance for the president to undermine the influence of his major political opposition. Thus, President DJ encouraged the prosecutors to investigate their corruption thoroughly (*Donga Ilbo* 8 September 1998: 5), and eventually HC released even a public apology on the scandal involving his faction (*Donga Ilbo* 5 November 1998: 1). It could be said that President DJ began being attracted to make an alliance with the prosecution service for the politicisation of criminal justice, rather than to strongly push for reform against it, given the usefulness of this power agency as a political weapon under continuous political conflicts.

Nonetheless, President DJ did not immediately abandon reform of the prosecution service. In fact, he could not neglect his long-term interest in the neutralisation of prosecutors as much as his short-term interest in exploiting them, in spite of their usefulness for a political weapon, since he had been a longstanding opposition leader. In particular, as DJ wrote, “I believed that Prosecutor General Tae-jung Kim could reestablish the prosecution service which is trusted by every citizen” in his retrospect (Kim 2011: 48), he apparently thought that reform against the prosecution service could be achieved to a certain extent, on the strength of the support from Prosecutor General Tae-jung Kim and other top rankers who had their origin in Jeolla. However, President DJ could not help but encounter a strong voice from prosecutors. In early 1999, as noted briefly in Chapter III, the Chief of Daegu High Prosecutor’s Office Jae-ryun Shim who had indicted YS’s son fiercely criticised that

the prosecutor general and some top-ranking prosecutors' excessive loyalty to President DJ was intensifying the politicisation of the prosecution service, in the situation where other top rankers including himself had to be dismissed due to bribery (*Donga Ilbo* 28 January 1999). Expectedly, a number of low-ranking and middle-ranking prosecutors supported Shim, and there emerged an unprecedented mass disobedience among prosecutors against the political leadership (*Gyeonghyang Sinmun* 29 January 1999). However, they could be understood to just demand the self-control over their careers, independent of the political branches, while pretending to advocate political neutralisation of the prosecution service. That is, the prosecutors' behaviour was an expression of their anxiety and discontent on the basis of their suspicion that Prosecutor General Tae-jung Kim and some top rankers loyal to DJ might support his reform against their collective interests.⁶ Though this affair came to a close as Jae-ryun Shim lost his job, it became obvious that numerous prosecutors could make a voice, when an incumbent president attempts reform against them.

However, President DJ's reform of the prosecution service entered on a new phase as the 'cloth lobby' scandal⁷ erupted in May 1999. Indeed, DJ had preserved his stance on the adoption of a 'regional autonomous police system' at least by March 1999 (*Gyeonghyang Sinmun* 24 March 1999). Meanwhile, the police agency also began to insist that police officers should assume the investigative power independent of prosecutors, and that the relationship between the two bodies should also be changed from the strict hierarchy into a cooperative relation. Moreover, since the Chair of the Special Committee for Reform of the Police Agency In-gi Choi declared to support the reform plan in favour of police officers via the adoption of a 'regional autonomous police system,' the police agency perceived this circumstance as an extra-ordinary chance to take over its own investigative powers, at least in part, from the prosecution service (*Hangyeore Sinmun* 4 May 1999). By contrast, the prosecution service strongly opposed the reform plan to give the autonomous investigative power to police officers with a voice. Even the Minister of Justice Sang-chun Park and Prosecutor General Tae-jung Kim were publicly against the plan, which clearly showed that the current leadership of the prosecution service did also not agree with the president's reform idea, in contrast to expectations. As an unprecedented clash between prosecutors and police officers was intensified, the issue of reform of the prosecution service was triggering a serious debate (*Hangyeore Sinmun* 8 May 1999; *Gyeonghyang Shinmun* 8 May

⁶ A former member of the Presidential Committee for Judicial Reform in President MH's period, Professor Bo-hack Suh explained that top-ranking prosecutors even encourage the low and middle rankers to form a collective opinion in order to interrupt any reformative action against their organisation, in an interview with me (25 June 2013).

⁷ For a more detailed description about the 'cloth lobby' scandal, see Chapter III.

1999). Then, the political scandal in which some current ministers' wives including the wife of the Minister of Justice⁸ had received expensive clothes as bribery broke out. Interestingly, the dominant view was that the police force intentionally leaked this scandal to seize a more advantageous position in the redistributive process of investigative powers over criminal procedure, although the police agency officially denied it (*Gyeonghyang Sinmun* 1 June 1999).

As explained above, the essence of the 'cloth lobby' scandal was that not a few wives of the influential persons in the incumbent government were involved in a corruption affair, while Tae-jung Kim's wife, Jung-hee Youn, was a core suspect. The main opposition party, GNP, even doubted that the first lady might be involved in the big scandal (*Gyeonghyang Sinmun* 31 May 1999: 5). DJ announced that the investigative team of the presidential administration had already examined this case five months ago and the ministers' wives were innocent, but the suspicions could not easily be quelled. Nonetheless, the prosecution service *de facto* hastily terminated criminal proceedings against this scandal (*Donga Ilbo* 3 June 1999). This was possible because the interests of President DJ and the prosecution service in giving immunity to the people involved in the affair coincided. On the one side, DJ could not help being burdened by the wide dissemination of this scandal and therefore having a strategic preference for the earliest close of this case. If the prosecution service would not help him, the DJ government might significantly lose its moral and political legitimacy at the critical juncture when the economic crisis at last began to recede.⁹ On the other side, the prosecutors could not make a thorough investigation into the scandal, owing to the former Prosecutor General (current Minister of Justice) Tae-jung Kim's involvement with it. If his involvement would then come into the open, prosecutors would be placed in a more disadvantageous position than police officers, in the middle of the debate over whether the former should or not transfer a part of the investigatory authority to the latter. Consequently, the 'cloth lobby' scandal gave a strong incentive for both the prosecutors and President DJ to solidify their alliance. In December 1999, as stated previously, the Special Prosecutor Byung-mo Choi finally disclosed that Joo-sun Park, who was a senior

⁸ Prosecutor General Tae-jung Kim was appointed to the minister of justice on 25 May 1999 but had to be faced with the 'cloth lobby' scandal after less than 10 days in his new post. Although the prosecution service did not indict his wife, DJ removed him from the minister of justice on 9 June 1999, perceiving him as a political burden. However, Tae-jung Kim was eventually indicted in December 1999, as a result of the special prosecutor's criminal investigation into the 'cloth lobby' (*Gyeonghyang Sinmun* 6 December 1999).

⁹ As explained previously, since the fact that the prosecution service had intentionally whitewashed the 'cloth lobby' case was disclosed by the Special Prosecutor Byung-mo Choi, President DJ and his faction ironically suffered a greater political loss than they would have lost if prosecutors had normally investigated the case from the outset.

prosecutor working as the presidential secretary for legal affairs, had secretly leaked a report on the preliminary investigation into this suspicion – conducted by the investigative team of the presidential administration – to Prosecutor General Tae-jung Kim, and the two had already conspired to cover it up in January 1999, though no evidence in which the first lady had been involved in the affair was found (*Gyeonghyang Sinmun* 21 December 1999).

However, a more important point, regarding this chapter, is that all the plans for large-scale institutional reform of the prosecution service, including a partial transformation of the existing criminal procedure into a common-law prosecution system, were removed from DJ's programmes for judicial reform immediately after the 'cloth lobby' scandal, although the necessity of reform against civil-law prosecutors became clearer than ever, due to this affair (*Donga Ilbo* 2 December 1999).¹⁰ Considering DJ's longstanding desire for reform against prosecutors, the sudden abandonment could not easily be explained. However, an incumbent president tends to suspend major reform against civil-law prosecutors, only by reason of their voice or the probability of their organisational resistance, as long as he is tempted to utilise them. The 'cloth lobby' scandal provided an opportunity for President DJ to realise the defensive value of the civil-law prosecutors' extensive power as a political instrument, in the situation where politics was judicialised through criminal proceedings, and the opposition forces vigorously denounced his political faction.¹¹ Consequently, DJ became attracted to seek his short-term interest in terminating this affair quickly, relying on the alliance with the prosecutors, but neglected his long-term interest in curtailing their massive power. After this scandal, as mentioned above, DJ pursued no more large-scale reform of the prosecution service, such as the adoption of a 'regional autonomous police system' but repeatedly tried to elevate his loyalists to a prosecutor general and other top-ranking positions (Chamnyeoyeondae 2003; Cho 2010: 98-107).

¹⁰ In this context, the Presidential Committee for Judicial Reform, which began discussing agendas for reform of the prosecution service in May 1999, terminated its task with no performance on reform of this power apparatus in December 1999. In particular, according to a white paper of the People's Solidarity for Participatory Democracy, this committee suggested no visible plan for the redistribution of investigatory powers over criminal procedure in its final report (Chamnyeoyeondae 2003).

¹¹ If the police agency intentionally leaked the 'cloth lobby' scandal in order to reinforce their bargaining power and consequently to obtain its own autonomous investigative power, it could not be a rational choice. This is because the scandal ironically made President DJ, who had been the most important reformist against prosecutors, vulnerable to the separation from them, and police officers could also not receive much support from the populace who perceived the debate over reform against the prosecution service as the power struggle between the two law enforcement agencies.

A few minor but unfavourable changes against the prosecution service (July 1999 - December 2002)

Obviously, President DJ failed to grant police officers the autonomous investigative power over criminal procedure via the adoption of a ‘regional autonomous police system,’ and correspondingly achieved no radical reform of the prosecution service. In contrast, a few minor changes against the prosecution service were accomplished in DJ’s period, unlike in YS’s period. For example, a ‘special prosecution system’ was introduced in 1999, and the National Human Rights Commission (NHRC) was founded in 2001. Moreover, the custom whereby a senior prosecutor is appointed to the presidential secretary for legal affairs was abolished in 2002.

<Table 4-1> Agendas for Reform of the Prosecution Service in President DJ’s Period
(December 1997 – December 2002)

| Driving force | Reform Programmes against Prosecutors | Result |
|-------------------------------------|---|-----------------|
| President DJ, and the NCND (MDP) | ◦ the adoption of a ‘regional autonomous police system’ ◦ the authorisation of independent investigatory power against some kinds of criminal offence for police officers | failure |
| | ◦ the elimination of the custom whereby a senior prosecutor is appointed to the presidential secretary for legal affairs | success |
| President DJ, and civil society | ◦ the foundation of a national human rights commission that would be able to check prosecutors to some degree in criminal proceedings → the enactment of the Law on the NHRC (May 2001) | partial success |
| The GNP | ◦ the introduction of a ‘special prosecution system’ → the first ratification of the Law on the Appointment of Special Prosecutor (September 1999) | partial success |

First of all, the debate over the adoption of a ‘special prosecution system’ was rapidly intensified, after the Head of the Public Security Department of the Supreme Prosecutor’s Office Hyung-goo Jin told some reporters that the prosecution service had intentionally encouraged the Korea Mint Corporation to strike in the previous year, while much drunken. This affair erupted only a few days after the suspected termination of the ‘cloth lobby’ scandal. Given that public suspicion towards the big scandal involving the wife of the minister of justice had not yet been resolved, the other top-ranking prosecutor’s *lapsus linguae* was sufficient to make the opposition parties and civic organisations denounce the president as well as the prosecution service strongly (*Hangyeore Sinmun* 9 June 1999; 14 June 1999). As noted above, President DJ finally had no choice but to dismiss his loyal

servant, the Minister of Justice Tae-jung Kim, owing to these unpredicted affairs connected to the prosecution service.

However, the GNP's reproach to the collusion between the president and the prosecution service did not cease, and eventually HC, the leader of the opposition party, began to insist on the introduction of a 'special prosecution system' (*Hangyeore Sinmun* 11 June 1999). In fact, the GNP could be understood to have a golden chance to push for this institutional model. To begin with, then prosecutors had difficulty in turning down all levels of reform against themselves, since they had lost public support because of the 'cloth lobby' and the 'strike of the Korea Mint Corporation' scandals. Several civic organisations and many citizens were also strongly demanding that an independent special prosecutor investigate these political scandals (*Gyeonghyang Sinmun* 3 June 1999; *Maeil Gyeongjae* 9 June 1999). In addition, through the 'special prosecutor system,' the opposition party would be able to undermine the moral legitimacy of the president's faction, while "wisely" avoiding a direct conflict with prosecutors by bypassing any reform to curtail their prerogative itself. Most importantly, the GNP would become to play a crucial role in selecting a special prosecutor and consequently to acquire an initiative for the politicisation of criminal justice, which had never been allowed for opposition parties, given that the party was sustaining the majority position in the National Assembly. Hence, the GNP violently pursued for the adoption of an overall 'special prosecution system' that would permit a special prosecutor to investigate any scandal involving the president's faction without constraints of time and case (*Gyeonghyang Sinmun* 16 June 1999).

In contrast, President DJ and the ruling coalition of the NCNP and the ULD declared their opposition to the introduction of a 'special prosecution system,' while expressing their view that a legislative investigation would be sufficient for a solution for the controversial scandals (*Hangyeore Sinmun* 15 June 1999). DJ had insisted on the necessity of an independent special prosecutor for his long life as an opposition leader, and proposed this institutional model in his 1997 presidential election promises, but completely reversed his stance on the issue after becoming president (Cho 1999: 423). Although the overall 'special prosecution system' could have restricted the prosecutors' enormous power as effectively as a 'regional autonomous police system,' DJ rarely had incentives to accept the model, in the situation where he began enjoying the firm alliance with the prosecution service but ignoring his long-term interest in reforming it after the 'cloth lobby' scandal. Furthermore, the president would be unable to dominate a special prosecutor. Hence, when the special

prosecutor would disclose extra facts in the scandals which had not been found by prosecutors, the suspicion of the president's intention to abuse the prosecution service as a political weapon might grow larger. That is, if the overall 'special prosecution system' had been introduced, an incumbent president's priority in the politicisation of criminal justice, relying on the civil-law prosecution service, would have been significantly undermined. Nonetheless, President DJ could not persistently oppose the adoption of this institution, because civic organisations, opposition parties, and public sentiment supported a 'special prosecution system' together. Therefore, the ruling bloc of the NCNP and the ULD finally suggested a limited 'special prosecution system' only for the scandal of the 'strike of the Korea Mint Corporation' as an alternative to the overall 'special prosecution system' proposed by the GNP.

As the controversy over a 'special prosecution system' between the ruling coalition and opposition party continued, both President DJ and the GNP underwent a political burden, and finally reached an agreement on the adoption of this system (*Gyeonghyang Sinmun* 22 July 1999). Specifically, the GNP accepted not an overall but a limited 'special prosecution system' while the NCNP and the ULD agreed to include the 'cloth lobby' scandal in the subjects of investigation by a special prosecutor, and consequently the 'special prosecution system' could be enacted in September 1999, for the first time, in South Korea (*Hangyeore Sinmun* 21 September 1999: 1). According to the first Law on the Appointment of Special Prosecutor,¹² the National Assembly proposes two candidates for the position of special prosecutor via the consensus between the ruling and opposition parties, and subsequently a president chooses one between the two (Article 3), which would weaken the incumbent president's exclusive power to abuse criminal proceedings by granting the legislature the initiative to appoint this important actor. However, given that the special prosecutor has to terminate the investigation on a targeted scandal at best within 70 days (Article 9), it was widely doubted whether he could effectively perform his role or not (Cho 1999: 437-438). Moreover, under a unified government, the opposition parties alone would have difficulty in appointing a special prosecutor, even if there emerges a political scandal involving the president's faction. Furthermore, the civil-law prosecutors' considerably destructive power would not be substantially constricted, although a special prosecutor could be appointed under the consensus of the legislative branch. The special prosecutor might only disclose hidden corruptions of the president's faction but could not prevent the prosecution service

¹² Regarding the original content of this law, refer to Hangukjopyegongsa nodongjohap paeobyudo mit jeon geomchalchongjang buine daehan otrobi uihok sageon jinsanggyumyeongseul wihan teukbyeolgeomsaui immyeong deunge gwanhan beomnyul (30 September 1990).

itself from selectively initiating criminal proceedings against the opposition parties. Since the first Law on the Appointment of the Special Prosecutor was enacted in September 1999, special prosecutors have sometimes been appointed, but they could not actually upset the alliance between an incumbent president and prosecutors. In short, the ‘special prosecution system,’ adopted in President DJ’s period, could not effectively prevent the politicisation of criminal justice, while making only a minor change in the dilemma from the institutional combination of the civil-law prosecution system and presidentialism.

On the other hand, as to minor changes of the prosecution service, it is useful to focus on the establishment of the NHRC in October 2001. The programme to create a human rights commission was also included in DJ’s presidential election promises, and he announced to the foundation of a human rights commission during his visit to the U.S. three months after becoming president (*Donga Ilbo* 8 June 1998: 1). However, the foundation of the human rights commission could not easily be launched from the beginning. In September 1998, the Ministry of Justice¹³ began to actualise the pledge of DJ, but aimed to place the human rights commission under its own control, regarding the status of the new organ (*Hangyeore Sinmun* 26 September 1998; 18 November 1998). This was because the new independent body might be able to curb the prosecution service. If the human rights commission would interfere in criminal proceedings for the purpose of protection of criminal suspects’ human rights, the prosecutor’s extensive power over criminal procedure would be significantly undermined (Kim, Seo, Oh and Ha 2011: 169). On the other side, many civic organisations raised a concern that the Ministry of Justice’s plan would threaten the independence of the new human rights commission. DJ’s NCNP was also supportive towards the independence of the new agency (*Hangyeore Sinmun* 20 March 1999). Even some international human rights groups, such as Amnesty International, expressed the concern that the human rights commission could not secure the independence from the Ministry of Justice (*Hangyeore Sinmun* 12 April 1999). Thus, President DJ could not downgrade the official status of the human right commission only to serve the preference of prosecutors. Nonetheless, a subtle alteration in the president’s opinion occurred, as he sought his short-term interest in abuse of the prosecution service rather than his long-term interest in large-scale reform against it after the ‘cloth lobby’ scandal in 1999. That is, President DJ could not refuse to grant the high status of an independent state body to the human rights commission, but at the same

¹³ From the aspect of government organisation, the Ministry of Justice can control the prosecution service. However, in practice, the latter dominates the former because prosecutors occupy most of the key posts in the ministry (Kim, Seo, Oh and Ha 2011: 168-172). For example, a prosecutor who has the rank of the chief of a high prosecutor’s office has been appointed to the deputy minister of justice with no exception. In addition, most of the ministers of justice have been appointed from former or current top-ranking prosecutors.

time could no longer go against prosecutors.

The above political dynamic of the main actors was well reflected in the Law on the NHRC (Gukgaingwonwiwonhoebeop) passed in May 2001, although the legislation had been delayed for some time (*Hanguk Ilbo* 2 May 2001).¹⁴ This law clearly states that the NHRC is an independent state organ (Article 3). The independent status could never be dismissed in the situation that not only domestic and international human rights groups were arguing, but DJ also won the Nobel Peace Prize in December 2000. However, the law was obviously designed to reflect the prosecutors' interest much more than those of other political and societal forces. For instance, the NHRC cannot receive petitions on pre-terminated criminal cases (Article 32), and has to transfer a received criminal case to investigative agencies, such as the prosecution service, when the petitioner legally files a complaint (Article 33). In addition, the law even rules that law enforcement agencies can exceptionally refuse to hand over secure materials and information about ongoing criminal cases to the NHRC (Article 36). These articles meant that the new independent state body can hardly restrict the prosecutors' enormously broad power in criminal proceedings. In particular, the establishment of the NHRC had little utility in reform of the prosecution service, also considering that human rights violations could be frequently committed, in criminal proceedings, by prosecutors.

Meanwhile, President DJ abrogated the practice, by which a senior prosecutor temporarily works as the presidential secretary for legal affairs, in February 2002 (*Hanguk Ilbo* 4 February 2002). This practice was established for the first time by Chung-hee Park, the authoritarian leader, which played a vital role in bridging between an incumbent president and the prosecution service for about 30 years. Considering that DJ no longer had a strong will to reform against the prosecution service, this reformative decision could also not be attractive for the president to make. In reality, it was known that some members within the president's faction were worried about the abolition of this practice (Hahm 2003: 141-142). Nonetheless, President DJ aimed to make clear that he would no longer unfairly misuse prosecutors, breaking the institutional link between the presidential administration and the prosecution service, in the circumstance where the politicisation of criminal justice was

¹⁴ In the political process of creation of the human rights commission, the opposition parties were not a major actor. Right before the enactment of the law in 2001, however, the GNP insisted that the human rights commission should accompany a 'special prosecution system' and therefore exercise its own investigative power (*Gyeonghyang Sinmun* 9 April 2001). This stance could be understood simply as an extension of the existing assertion of the party. However, the ruling bloc flatly turned down the assertion, and eventually no 'special prosecution system' could be included in the Law on the NHRC.

seriously criticised because of the ‘cloth lobby’ and the ‘strike of the Korea Mint Corporation’ scandals. However, the elimination of this previous custom was far from a revolutionary reform to curtail the prosecutors’ enormous power, and hence the president still had no great difficulty in politicising criminal justice. As examined in Chapter III, DJ frequently tried to promote his loyalists to the leadership posts of the prosecution service, even since the elimination of this custom. Prosecutors also had no critical reason to oppose the abolition of practice of the senior prosecutors’ temporary appointment to the post of president’s legal secretary, given that this minor change could not directly curtail their wide power over criminal procedure but cause only a little inconvenience to an incumbent president.

In short, President DJ owned a strong will to reform of the prosecution service in his long life as an opposition leader and actually pushed for it after winning presidency. However, in accordance with Hypothesis I-2 of this thesis, President DJ abandoned his long-term interest in reform of the prosecution service, but committed to the short-term interest in the alliance with the power apparatus, when facing the prosecutors’ voice and the possibility of their organisational resistance in some affairs, particularly after the ‘cloth lobby’ scandal. Although a few minor changes against the prosecution service could be achieved during DJ’s tenure, these could contribute to neither breaking the alliance between a president and civil-law prosecutors nor reducing their enormous power over criminal procedure. On the other hand, President MH was different from DJ in the respect that he never abandoned large-scale reform of the prosecution service, which is examined in the next section.

4. 2. Consistent attempts to reform the prosecution service and their failure in President MH’s period

4. 2. 1. The president and the prosecution service in the early phase of President MH’s period

A political outsider MH’s presidential inauguration

In December 2002, MH, the candidate from Millennium Democratic Party (MDP), won the 16th Korean Presidential election. However, MH’s presidential inauguration had not easily been predicted by anyone just one year previously, given his tortuous life and unique

behaviours as a non-mainstream politician. MH was neither astute, compared to the former presidents and leading politicians of the era, nor a political leader with the capital based on political regionalism. Instead, he had been regarded as one of the most radical and vigorous politicians in South Korean political history. In particular, since MH refused to follow YS when the latter decided to combine his Reunification Democratic Party (RDP) with the authoritarian heirs' Democratic Justice Party (DJP), and established the DLP to gain the presidential candidacy of the huge ruling party in December 1990, he could not escape an arduous political journey. For example, MH could neither win a legislative seat in the 1992 National Assembly election nor obtain the mayoral post in the provincial election in 1995, in Busan, the largest city in the region under the dominance of YS (*Hangyeore Sinmun* 25 March 1992; *Maeil Gyeongjae* 28 June 1995). In fact, there was his short political heyday when he won the by-election for the legislative seat of Jongno-gu known as the heart of Korean politics¹⁵ in 1998, after joining DJ's NCNP (*Donga Ilbo* 22 July 1998). In 2000, however, MH again challenged for a legislative seat in Busan, where the political parties created by DJ had been able to win no legislative seat, under the slogan of breaking down the political regionalism, but failed once more.

MH could not make a sizeable political faction, remaining as a minor politician not only in the party but also in the legislature, due to his strong reformist mind and repeated failures, but he was gradually building his image as an exceptionally honourable politician. More and more people, who had become disillusioned with the established politicians, began to be impressed by his reformist activities, ahead of the presidential election in December 2002, according to several analyses or comments in major newspapers (*Donga Ilbo* 22 March 2002; *Hanguk Ilbo* 22 March 2002). In particular, young generation zealously supported him. In addition, the MDP introduced the American-style 'open primaries' in selecting the candidate for the 2002 presidential election, which could provide a chance for MH to dream of becoming president (Saxer 2003: 26-27). The 'open primaries' brought the drastic change in which a politician could gain the presidential candidacy, relying on non-party electorates' support, even though a majority of party members did not support him (*Hanguk Ilbo* 6 December 2001). Therefore, non-party electorates who had a trust in MH's upright image could make his unexpected success in this pre-contest (*Hanguk Ilbo* 27 April 2002). After winning the presidential candidacy of the MDP in April, MH at last defeated HC, the candidate of the GNP, in the presidential election in December 2002. According to

¹⁵ Interestingly, the 17th South Korean President Myung-bak Lee had also obtained the legislative seat allocated for this district, Jongno-gu, in the 1996 National Assembly election but had to resign, before long, due to his illegal election campaign.

Kim (2008: 178), MH could take this victory because he not only received overwhelming support, as a political successor of DJ, from Jeolla but also acquired a considerable share of the votes of South Gyeongsang, because of his birth and growth in this region that had usually been supportive of the GNP.

MH's rise to presidency caused animosity among existing political and economic elites, given his relatively radical propensity and life as a political outsider. In fact, his resistant inclination was quite different from that of DJ. President DJ was a longstanding opposition leader but always a major politician, and possessed his own political faction based in the region of Jeolla. By contrast, MH had no experience of leading a political faction but he was more closely connected to societal forces, such as student movements or labour unions in civil society. Thus, the existing political and economic authorities could not help being afraid of his triumph. Their concern about the new President MH was clearly reflected in the primary comments of major conservative newspapers (*Donga Ilbo* 20 December 2002; *Joseon Ilbo* 20 December 2002; 25 February 2003). In practice, MH stressed that all kinds of injustice such as inappropriate privileges and opportunism should be eradicated, in his inaugural address (*Donga Ilbo* 26 February 2002: 1). Moreover, he suggested the essential reform of the powerful law enforcement agencies, including the NIS, the tax service and the prosecution service (*Hangyeore Sinmun* 3 March 2003: 4), which reflected that the president perceived the power organs protecting a few corrupt dominant elites as a main cause of the injustices and politico-societal inequalities. Then, the prosecution service was bound to be regarded as the first target, given that it had been misused for the politicisation of criminal justice, as the strongest actor among the power organs after democratisation. In addition, MH himself, who had a lawyer career, exactly understood the risk of improperly controlled civil-law prosecutors (Roh 2010: 272-274). That is, President MH obviously pursued his long-term interest, based on his much stronger will than the former presidents', in reform of the civil-law prosecution service, but abandon to seek the short-term interest in the politicisation of criminal justice from the beginning of his tenure.

The starting stage of reform against the prosecution service (December 2002 - September 2003)

Immediately after winning the presidential election in December 2002, MH suggested an agenda for revolutionary reform of the prosecution service. The essence of specific agenda presented by his Presidential Transition Committee was follows: (i) the foundation of an 'investigative agency against corrupt high-ranking state officials'; (ii) the expansion of

kinds of criminal case in which the prosecutors' decision not to indict a suspect (based on *Opportunitätsprinzip*) can be officially complained about; and (iii) the authorisation of police officers' autonomous investigative power on criminal offences connected to public order (Je16dae Daetongnyeongjiginsuwihonhoe 2003: 146-148).¹⁶ If only one goal among the three were thoroughly achieved, the existing prerogatives and roles of the prosecution service would be significantly restricted. As a consequence, the violation of human rights and the politicisation of prosecutors would be substantively prevented. As discussed in the previous section, President DJ who had also held a strong will for reform against the prosecution service at the beginning of his tenure attempted to grant police office the independent investigative power only in part via the adoption of a 'regional autonomous police system' among the three reform plans – although this plan was more moderate than MH's idea – but finally abandoned it. By contrast, President MH aimed at much more revolutionary reform against the prosecution service than his predecessor, considering the reform programmes at the start of his incumbency.¹⁷

First of all, President MH began to reform the prosecution service through surprising selections of the minister of justice and top-ranking prosecutors. He appointed Kum-sil Kang, who had worked as judge for about 10 years and afterward acted as human rights lawyer with MH in civil society, to the minister of justice in his first cabinet. MH intended to choose a candidate who was not only capable but also relatively free from the interests of prosecutors for the post, before the start of reform of the prosecution service. However, Kum-sil Kang's appointment as the minister of justice gave prosecutors a shock, given that no woman had been advanced even to the deputy chief of a district prosecutor's office until then (*Donga Ilbo* 25 February 2003). Furthermore, there emerged a controversy whether the Minister of Justice Kum-sil Kang could properly control prosecutors, since she had no career in the prosecution service and was much younger than most of the then top-ranking prosecutors (*Gyeonghyang Sinmun* 28 February 2003).

¹⁶ The authorisation of police officers' partly autonomous investigative power could actualise the first step of transformation into a common-law prosecution system. In addition, given that the expansion of kinds of criminal case in which the prosecutors' decision not to indict a suspect can be officially protested could curb the prosecutors' *Opportunitätsprinzip*, this proposal could also result in transformation into a typical civil-law prosecution system. Finally, the 'investigative agency' could prevent prosecutors from catalysing the politicisation of criminal justice or covering up particular politicians' corruption, by supervising high-ranking state officials including prosecutors *per se*. Each proposal is dealt with in the next sections.

¹⁷ Right after MH's rise to presidency, the legislative hearing for the appointment of a prosecutor general became mandatory, as the Law on Confirmation Hearing (Insacheongmunhoebeop) was amended in February 2003. Therefore, the National Assembly could impose a political burden on a president by expressing a strong dissatisfaction with his nomination for the position of prosecutor general, although the legislature could not block the appointment itself through its voting.

The President MH's surprising personnel decision was not confined to the appointment of Kum-sil Kang. He indirectly enforced the incumbent leadership of the prosecution service to resign, by promoting senior prosecutors who had accumulated relatively less seniority to some top-ranking positions, such as the deputy minister of justice or prosecutor general (*Donga Ilbo* 12 March 2003; *Hanguk Ilbo* 4 March 2003). As explained in Chapter III, due to the extreme emphasis on seniority for the organisational hierarchy in the prosecution service, when a prosecutor even occasionally gained advancement to a top-ranking position earlier than his seniors who had entered this organisation before he did, the seniors used to resign customarily. President MH could replace most current top-ranking prosecutors by exploiting this custom. Then, Kwang-soo Song got promoted to new prosecutor general and Dae-hee Ahn got advanced to the new head of the Central Investigative Department of the Supreme Prosecutor's Office (CID), who had been known as relatively less politicised but more reformist figures (*Hangyeore Sinmun* 12 March 2003). While prosecutors deeply worried about the shocking personnel decisions of the president, the renewal of top rankers was clearly perceived as a pre-treatment of reform against the prosecution service (*Hanguk Ilbo* 8 March 2003). By nature, prosecutors did not modestly embrace President MH's unprecedented personnel policy.

Meanwhile, President MH decided to exceptionally hold a public TV discussion with low-ranking prosecutors on 9 March 2003, which was the well-known 'president's talk with prosecutors.' MH himself expressed that he aimed to publicly appeal young prosecutors who were expected as having a relatively strong sense of justice, and therefore to induce them to voluntarily declare their political neutrality before the whole South Korean people (Roh 2010: 272-273). He was thinking that the low ranker's support would be essentially required for reform of the prosecution service. However, the debate between the president and young prosecutors unfolded rather differently than MH had wished. The low-ranking prosecutors dogmatically demanded the president to allow them only the self-control over the budgetary and personnel issues of the prosecution service for their independence, while violently opposing any reform plan which might reduce their prerogatives. In addition, the atmosphere of the debate turned increasingly ugly, since a prosecutor revealed that senior politicians belonging to the new ruling faction had already enforced the prosecution service to terminate a criminal case involving a *chaebol*, SK Group, at a moderate level (*Donga Ilbo* 10 March 2003; *Hangyeore Sinmun* 10 March 2003). As a result, the 'president's talk with prosecutors' hardly made a big achievement, but simply showed a large gap between the ideas of the reformist president and prosecutors.

Ironically, President MH lost much, whereas the prosecution service obtained more, owing to this public discussion. Given the prosecutors' enormously broad power over criminal procedure, it could never be a desirable option for the president to permit them to hold a full control over their career. Yet, President MH had to avoid even a little misunderstanding about his abuse of the prosecution service, since he strongly insisted that prosecutors had to be politically impartial before the whole people. Although MH seldom sought his short-term interest in the politicisation of criminal justice from the beginning, he had to more strongly restrain himself. However, this attitude of MH unintentionally left prosecutors to be unaccountable to any state bodies including the president himself and correspondingly to exercise their enormous power arbitrarily. On the other side, the new leadership of the prosecution service, who had not been so loyal to MH, became less hesitant about bringing criminal proceedings against his political faction. According to Hypothesis II, under the institutional combination of presidentialism and a civil-law prosecution system, if political competition is high and an incumbent president does not abandon major reform of the prosecution service, even the top rankers loyal to the president would react against him in order to block the reform – for example, Prosecutor General Tae-jung Kim in DJ's period –, despite the risk of disadvantage to their career development. In President MH's period, however, the prosecution service could more uninhibitedly block the president's reform, because he voluntarily refused to promote his loyalists to top rankers after the 'president's talk with prosecutors.' The above political dynamic is demonstrated by the case of the 'illegal political funds for the 2002 presidential election,' in which prosecutors brought criminal proceedings against both the ruling and opposition parties in autumn 2003.

The 'illegal political funds for the 2002 presidential election' scandal and counterattack of the prosecution service (October 2003 - April 2004)

President MH was considerably ready for reform of the prosecution service, through the appointment of a reformist minister of justice and the generational shift of the leadership in the power apparatus. However, his reform programme could not smoothly go along from the beginning. Prosecutors started to investigate the closest aides of the president only three months after MH's inauguration. For instance, among MH's old comrades, Dong-young Yeom was indicted on suspicion of receiving bribery from a financial company, Nara Jonggeum, and Hee-jung Ahn was also investigated by the same token (*Hanguk Ilbo* 6 May 2003). In particular, the prosecution service tenaciously attempted to indict Hee-jung Ahn, even though courts repeatedly refused to give prosecutors a detention warrant against

him (*Donga Ilbo* 26 May 2003). The fact that prosecutors instituted criminal proceedings against the president's faction in less than a year was exceptional, compared to President YS's and DJ's periods when the prosecution service had demonstrated loyalty and kept its alliance with the presidents by and large until the last phase of their tenure. Above all, the scandal of 'illegal political funds for 2002 presidential election' broke out in July 2003, which not only decisively reversed the relationship between prosecutors and President MH, but also undermined his momentum for reform against the prosecution service.

This scandal was unexpectedly broken by the leader of the ruling party, MDP, Dae-chul Jung, who was being examined by the prosecution service. Dae-chul Jung was regarded as revealing that MH had received no small amount of illegal funds from private companies for the 2002 presidential election, in order to send a warning that he would never die alone to the president (*Donga Ilbo* 12 July 2003). As the scandal increased and the opposition party (GNP) began to furiously criticise President MH, he faced a serious political crisis. In addition, the influence of the president's faction was undermined, because of the conflict between pro-MH and the other factions within the MDP, also in the National Assembly.¹⁸ In this situation, MH who had prided himself on his moral foundation as the most vital political resource had to overcome the crisis as soon as possible. Then, interestingly, MH suggested that both the ruling and opposition parties would openly disclose their illegal political funds for the 2002 presidential election, insisting that politicians should take this scandal as a good opportunity to eradicate the corruptive practice of South Korean politics (*Hangyeore Sinmun* 16 July 2003: 5). Moreover, he even urged the prosecution service to vigorously investigate the illegal political funding of the two parties (*Hangyeore Sinmun* 22 July 2003). Considering that the then First Presidential Secretary for Political Affair In-tae You stated, "HC certainly collected more illegal political funds than MH in the 2002 presidential election" (*Gyeonghyang Sinmun* 16 July 2003: 3), President MH obviously aimed to overcome the crisis through a kind of self-destructive strategy.

In October 2003, the CID decided to summon two legislators, Don-woong Choi in the largest opposition party, GNP, and Sang-soo Lee in the ruling party, MDP, and most importantly, Do-sool Choi, one of President MH's closest aides, on the grounds that they might be connected to the illegal political funds from SK Group (*Gyeonghyang Sinmun* 8 October 2003). The press also widely reported that the prosecution service launched an

¹⁸ Later, the MDP split into two parties, and the pro-MH faction built the new ruling party, Our Open Party, which held only a small number of legislative seats, in November 2003.

intensive investigation of the politicians involved in the ‘illegal political funds for the 2002 presidential election’ (*Hanguk Ilbo* 8 October 2003; *Hangyeore Sinmun* 8 October 2003). Since Do-sool Choi was one of MH’s old comrades, like Hee-jung Ahn, the prosecutors’ institution of criminal proceedings against him was sufficient to be regarded as targeting the president. Nonetheless, President MH once again emphasised that prosecutors should impartially and transparently deal with the scandal, and accordingly the prosecution service announced an expansion of the scope of the investigation of the ‘illegal political funds for the 2002 presidential election,’ in November this year (*Segye Ilbo* 4 November 2003). Given that President MH even declared that he would voluntarily resign if it would turn out that he had collected illegal political funds more than one tenth of HC’s, MH indeed had confidence in his relatively higher morality.

While the GNP insisted on the appointment of a special prosecutor against the corruption of the president’s henchmen, the investigation of the prosecution service was intensified, and consequently, a considerable number of politicians belonging to both the GNP and the president’s faction were arrested and indicted. Although the GNP strongly criticised that the prosecution service manipulated criminal proceedings to the disadvantage of the party (*Donga Ilbo* 5 November 2003), not only HC’s former legal assistant, Jung-woo Seo, but MH’s close allies, Hee-jung Ahn and Kum-won Kang also, were prosecuted in December 2003 (*Hanguk Gyeongjae* 30 December 2003; *Maeil Gyeongjae* 30 December 2003). The CID’s investigation into the ‘illegal political funds for the 2002 presidential election’ was completed only in March 2004. As a result of the prosecutors’ exceptionally rigorous investigation against the ruling and opposition factions at the same time, it was disclosed that the GNP (about USD 73 million) had collected seven times as much illegal political funds for the election as the MDP (about USD 10 million) from businesses, especially the *chaebols* (*Hangyeore Sinmun* 9 March 2004). Although MH’s illegal funds exceeded one tenth of HC’s amount, it can be said that President MH achieved his original political goal in the phase of the prosecutors’ criminal proceedings against politicians concerned with this major scandal.

However, President MH in fact lost not a few things for reform against the prosecution service. It cannot be denied that some members of the president’s faction were actually involved in the scandal. Thus, the prosecutors’ institution of criminal proceedings against MH’s faction deserved praise, compared with the previous prosecution service which had taken partisan behaviour in favour of an incumbent president until the last phase of his

tenure, in normative terms. In practice, the prosecution service, which had been seriously criticised for its repeated partisan behaviours, regained its prestige, and Prosecutor General Kwang-soo Song and the Head of the CID Dae-hee Ahn acquired even an exceptional popularity, due to the investigation into the scandal of ‘illegal political funds for the 2002 presidential election’ (*Hanguk Ilbo* 31 October 2003). However, this affair meant more than that the prosecution service “bravely” brought criminal proceedings against not only an opposition party but also a president’s faction at the beginning of his tenure. A more important point was that the prosecutors instituted the criminal proceedings against the president’s close allies at the very time when MH was about to push for reform against their collective interest.

This case could exactly confirm Hypothesis II. President MH did not pursue the short-term interest in covering up the corruption of his political faction by an abuse of the civil-law prosecutors, while adhering to his long-term interest in reform of the power organ, unlike President DJ in the ‘cloth lobby’ scandal. There, the prosecution service undoubtedly chose to make an organisational resistance against the incumbent president. While prosecutors politicised criminal justice against both the ruling and opposition factions, MH and his minority force, whose moral advantage was a main political resource, could not help losing public trust, even though they were comparatively less corrupted than the GNP.¹⁹ In other words, the moral foundation and political influence of MH’s faction were damaged,²⁰ and consequently the momentum for reform of the civil-law prosecution service was already undermined at the beginning of his tenure. The political dynamic of weakening of the president’s momentum for the reform could also be confirmed by the former Minister of Justice Kum-sil Kang’s testimony in an interview:

“The MH government’s reform of the prosecution service was bound to fail because of the investigation into the illegal political funds for the 2002 presidential election...Also in the relation with public, the prosecution service took more advantages than the president. The presidential administration became a subject of the prosecutors’ investigation, in other words, a criminal suspect...It was a very difficult context for me even to mention the reform” (Moon and Kim 2011: 150).

¹⁹ There can be a criticism that this case is not exactly consistent with Hypothesis II. It can be said that MH and his close allies did not lose political competitiveness, compared to the GNP, in a relative sense because the corruption of the GNP disclosed by the prosecution service was more serious than that of the president’s faction. However, except for an electoral authoritarian regime, any political faction could not help but be deprived of its moral foundation and corresponding political influence, when it is investigated by prosecutors, in a competitive democracy. Hence, President MH’s driving force to reform against the prosecution service could not help being substantively undermined.

²⁰ Regardless of the illegal funds for the 2002 presidential election, MH’s brother Gun-pyung Roh was also indicted on the charge of individual corruption at that time.

It cannot be said that there was no reform of the prosecution service, given that minor changes to alleviate the strong organisational hierarchy among prosecutors was taken in this phase. As noted in Chapter III, the ‘principle of a single and centralised prosecution service’ was removed, and seven ranks of bureaucratic career ladder were reduced to only the two ranks (the prosecutor general and prosecutor), along with the amendment of the Prosecutor’s Office Law in January 2004, though these changes could not sharply weaken the rigid organisational hierarchy. Soon after, President MH was impeached by a coalition of the GNP and the MDP, on the charge of violation of electoral law, in the situation that the number of legislators of the new ‘party of power,’ Our Open Party (OOP), was less than 50 in the National Assembly, and correspondingly the unprecedented affair of the suspension of the presidential authority emerged on 12 March 2004. According to the 1987 Constitution, when the legislature impeaches a president, the constitutional court is obliged to make an ultimate decision on the impeachment (Article 65; 111). Therefore, President MH could do no political activity until the final judgment of the constitutional court. His reform of the prosecution service was also bound to cease temporarily.

4. 2. 2. Major reform attempts but minor changes of the prosecution service in President MH’s period

The decision to impeach President MH, by the legislative majority coalition of the GNP and the MDP, ironically contributed to the expansion of public sympathy towards him, despite the prosecutors’ institution of criminal proceedings against his faction members. The campaign initiated by MH’s core supporters rapidly developed into national movement for the president and ruling party, OOP (*Gungmin Ilbo* 13 March 2004; *Hangyeore Sinmun* 15 March 2004). In contrast, as the legislative decision to impeach the current president was perceived as a ‘legislature’s *coup*,’ the GNP and the MDP which had decided the impeachment considerably lost popularity. In this circumstance, the GNP attempted to overcome the crisis by replacing its leadership with the former President Jung-hee Park’s daughter, Geun-hye Park, and consequently rallying its supporters from the traditional conservative forces and regions of North and South Gyeongsang. However, it was very difficult for the MDP, which had to share the supportive class and region such as Jeolla with the OOP, to resolve the political crisis. Meanwhile, the former President DJ also ignored the request for aid from the MDP but made efforts to remain impartial, even though his influence was still strong in Jeolla (*Hangyeore Sinmun* 21 January 2004). As a consequence, the OOP could gain an absolute majority of legislative seats (152/299) in the

National Assembly election in April 2004. The GNP could also secure a significant amount of the seats thanks to the overwhelming support from Gyeongsang, whereas the MDP rapidly declined into a minor political party, which possessed less than 10 legislators. Soon after, the constitutional court dismissed the legislative decision for the impeachment (Lee 2005a: 413-415), and correspondingly President MH could be returned with the majority ruling party in the National Assembly. Propelled by the favourable political conditions such as the unitary government, the president launched various reforms. For instance, the OOP, following President MH's will, proposed bills to establish historical facts which had been distorted by the authoritarian regimes, and to abolish the National Security Law which had been misused, as a legacy of the Cold War era, for the censorship of political thoughts (*Segye Ilbo* 21 October 2004). With this mood for various reforms, President MH attempted to create an 'investigative agency against corrupt high-ranking state officials' as large-scale reform of the prosecution service.

The attempt to create the 'investigative agency against corrupt high-ranking state officials' and its failure (May 2004 - March 2005)

As mentioned before, the foundation of an 'investigative agency against corrupt high-ranking state officials' (the 'investigative agency') had already been planned as a specific proposal by MH's Presidential Transition Committee, which attempted to form a politically neutral state body examining high-ranking officials, such as politicians, bureaucrats, judges, prosecutors and so on. Indeed, there had been no other device for checking prosecutors except the president's control over their careers, which had actually induced them not to fairly exercise their enormously broad power over criminal procedure but to abuse the great power in favour of an incumbent president or against him. Even a special prosecutor, who not only requires the approval of the legislative branch but also works temporarily, could not function as a permanent body for curbing the prosecution service. In this regard, President MH aimed to restrict the prosecutors' monopolistic control over politically or socially crucial criminal cases, by creating the new 'investigative agency.' It could be understood as one of traditional measures for the proper check over a civil-law prosecution service, given that this agency would be similar with the instructing judges who *de facto* lead the processes of investigation and indictment in high-profile criminal cases in France.

However, the 'investigative agency' would entail both the advantages and disadvantages. As explained above, it was almost impossible that there would be 'checks and balances' among prosecutors, owing to the strong organisational hierarchy and cohesiveness of the

prosecution service. Accordingly, the ‘investigative agency’ was designed to restrict the prosecutors’ enormous power, by depriving the prosecution service of its exclusive control over criminal proceedings against high-ranking state officials. That is, this agency would substitute for the CID. In particular, the ‘investigative agency’ would be able to play a role in punishing the prosecutors’ corruption and arbitrariness, and consequently they would be kept from manipulating criminal proceedings in favour of the strong and rich, such as the *chaebols*. By contrast, as prosecutors argued, the ‘investigative agency’ might not be so different from the prosecution service in intensifying the danger of the politicisation of criminal justice, unless it could be induced not to be independent but to be impartial. Also in France, the instructing judges have sometimes been involved in the judicialisation of politics because of their independence from the other branches of government, although there are few criminal cases handled by them (Guarnieri 2003: 234; Verrest 2000: 215).

On the basis of the advantages and disadvantages, President MH proposed the bill on the establishment of the ‘investigative agency’ in November 2004 (*Donga Ilbo* 3 November 2004). According to the bill, the ‘investigative agency’ would be placed under the Korea Independent Commission against Corruption (KICAC), and the chief of the KICAC would nominate a candidate, among prestigious lawyers, for the chief of the new agency and subsequently the president would appoint him. In the dimension of institutional power, the ‘investigative agency’ would be able to investigate legislators, ministers, deputy ministers, judges, prosecutors, etc. and their family as the subjects, but only hold investigative power without the right to indict criminal suspects (*Hangyeore Sinmun* 3 November 2004).²¹ As expected, the prosecution service opposed this bill vigorously (*Gyeonghyang Shinmun* 20 October 2004). In contrast, both the ruling and opposition parties agreed on the necessity of such a new agency, since this reformative law would obviously serve the interests of politicians, including not only the president, in particular when he is outgoing, but also the others.

However, the legislature suddenly turned against the creation of the ‘investigative agency,’ reversing its ground before long. The GNP perceived that the ‘investigative agency’ would eventually contribute to the empowerment of presidency, because the new organ could be dominated by the current president (*Hanguk Gyeongjae* 8 October 2004; *Maeil Gyeongjae*

²¹ There was a concern about that the ‘investigative agency’ could not be autonomous from the prosecution service, as long as the former could not exercise the power to indict criminal suspects. For this reason, the OOP had argued that the ‘investigative agency’ should be given the power for the indictment at first (*Gungmin Ilbo* 25 September 2004). But this concern would not come true, if prosecutors could control only the stage of indictment, being unable to dominate the ‘investigative agency’ during its investigation.

21 March 2005).²² Democratic Labour Party also suspected the danger of its partisan attitudes (*Seoul Gyeongjae* 29 March 2005). As the ‘investigative agency’ would be placed under the KICAC belonging directly to presidency, according to the proposed bill, the doubt was reasonable to a certain extent. Furthermore, Democratic Labour Party opposed the bill on the grounds that the ‘investigative agency’ would expose its inefficiency in punishing the corruption of high-ranking state officials without the right to indict them. Nonetheless, this legislation would be able to pose the ‘checks and balances’ between the prosecution service and the ‘investigative agency,’ and correspondingly to keep the former from wielding its enormous power arbitrarily, given that the bill aimed to allow the latter the investigatory power at least in criminal proceedings against high-ranking state officials. As a result, there was no doubt that a certain political faction would have more difficulty in judicialising politics via criminal proceedings than ever, which would give a benefit to the opposition parties as well. Rather, the suggestion of Democratic Labour Party might make the ‘investigative agency’ have no difference from the current CID. Thus, the reason that the GNP and Democratic Labour Party refused any negotiation with the president’s side seemed to be because they could not really understand the essence of this reformative change, and moreover, the GNP might enjoy another conflict between President MH and prosecutors.²³

More noticeably, President MH could not gain wholehearted cooperation from the ruling party, OOP, as well. From the outset, in fact, the legislators who had the career of lawyer in the OOP, such as Jung-bae Chun, had been unsatisfied that MH and the Minister of Justice Kum-sil Kang pushed ahead with reform of the prosecution service, ignoring the ruling party.²⁴ In addition, the legislators belonging to the OOP did not show enthusiasm for the foundation of the ‘investigative agency,’ on the grounds that subjects of the investigation by the new agency would include legislators as well (Moon and Kim 2011: 254, 309). Yet, the most important point is that prosecutors were then targeting the OOP. Prosecutors had already indicted as many as 29 legislators of the OOP on the charge of violation of electoral law in the 2004 National Assembly election (*Hanguk Ilbo* 16 October 2004).²⁵

²² Since the GNP included most of the legislators with the career of prosecutor, they also significantly contributed to the party’s opposition, blocking a pass of the bill in the Legislation and Judiciary Committee of the National Assembly (Kim, Seo, Oh and Ha 2011: 153-154; Moon and Kim 2011: 310-313).

²³ Strictly speaking, the opposition parties had no rational reason to refuse the creation of the ‘investigative agency.’ In actuality, President MH also regarded the objection from them just as unconditional refusal against him (Roh 2010: 274).

²⁴ Ironically, Jung-bae Chun was appointed to the minister of justice in June 2005.

²⁵ Indeed, the presentation of the bill for the ‘investigative agency’ to the legislature was possible, in part because prosecutors did not bring criminal proceeding against the president’s closest allies in that time.

The ruling party might be able to lose its majority, depending on the judges' decisions (*Donga Ilbo* 9 November 2004). After the presentation of the reformist bill, in particular, the prosecution service brought criminal proceedings against Boo-young Lee, the former leader of the OOP, who had supported the creation of the 'investigative agency,' on the charge of bribery, and even undermined public trust for the leadership of the ruling party through intentional leak of the investigative process (*Segye Ilbo* 1 February 2005; *Seoul Sinmun* 7 September 2004). At that time, moreover, Hee-sun Kim, another senior legislator of the OOP, also began to be investigated, by the Seoul District Prosecutor's Office, on the charge of bribery (*Gyeonghyang Sinmun* 25 February 2005).

Accordingly, the conflict between the ruling party and prosecution service grew so fierce that the OOP denounced that prosecutors were intentionally going against the party (*Segye Ilbo* 7 February 2005: 4). The prosecutors' intensive investigations and indictments against the senior members of the ruling party were not unrelated to the party's legislative support for reform against the prosecution service (*Jugan Hanguk* 22 February 2005). That is, President MH could not receive a complete support from the ruling party, in pushing for the reform bill against prosecutors, due to their institution of criminal proceedings against the members of the OOP, in accordance with Hypothesis II of this thesis. As a result, the president could not keep the momentum for the establishment of the 'investigative agency,' in spite of the other favourable political conditions for him, such as his temporarily high popularity or the majority ruling party in the National Assembly. As explained below, prosecutors repeatedly brought criminal proceedings against MH's faction members, and consequently the bill for the 'investigative agency' was infinitely put off, eventually failing, like other reform plans against the civil-law prosecution service, as his presidential tenure went to the later period.

A few other attempts of major reform of the prosecution service and their failure or partial achievement (April 2005 - June 2007)

In September 2004, after returning to presidency, MH already began to push for the transfer of a part of investigatory authority over criminal procedure from prosecutors to police officers, in line with the creation of the 'investigative agency.' This attempt to redistribute the investigatory powers between the prosecution service and police agency was somewhat different from the other reform plans against prosecutors, in the respect that the police agency as an important actor, which had long wished to achieve an autonomous investigatory power, could provide support to this change. Thus, President MH encouraged

the prosecution service and the police agency to voluntarily redistribute the investigative powers in the Investigatory Authority Coordination Committee, while he led to create the ‘investigative agency.’ In April 2005, however, the voluntary coordination between the two power organs ceased because the two stuck to their extreme stance. Prosecutors argued that they would be required to restrain themselves from controlling investigations of relatively less serious criminal offences but should not lose the power to direct police officers during investigations, because of the danger that the latter might still infringe upon the human rights of criminal suspects in this stage. By contrast, the police agency insisted that police detectives should hold independent power to terminate criminal cases at least on minor crimes, because in no other country were police officers so excessively subordinate to prosecutors. Therefore, the conflict between the two sides reached its climax around the controversy over amendment of Article 196 of the Criminal Procedure Act, which specifies the prosecutors’ power to dominate police officers during criminal investigations (*Maeil Gyeongjae* 3 May 2005).

In this situation, President MH finally decided to intervene in the adjustment process of investigative powers over criminal procedure, mentioning that prosecutors should abandon their existing privileges on 21 April 2005 (*Hangyeore Sinmun* 22 April 2005: 1). This implied that the president still pursued his long-term interest in reform of the prosecution service. Immediately after MH’s announcement, moreover, the plans of the Presidential Committee for Judicial Reform²⁶ were disclosed on 26 April, which also included major reform connected to rearrangement of the investigatory powers. According to this reform plan, the current criminal procedure would be amended to permit a defendant to deny the admissibility of evidences from prosecutors’ investigative report about his case in courts (*Donga Ilbo* 28 April 2005). This plan aimed to change the South Korean criminal justice system into a common-law one in part, by adding some adversarial elements, but was also supposed to restrict the prosecutors’ own investigative power into all kinds of criminal cases (Lee 2012: 276-277). If even the prosecutors’ investigative report would become unavailable for evidences in a trial, the prosecution service would retain only the right to oversee the investigation of serious criminal offences, given that there had already been a controversy over the abolition of the prosecutors’ power to direct police officers during investigations of minor crimes.²⁷ That is, the prosecution system would be substantially

²⁶ This committee was also a provisional organ, like the Presidential Committee for Judicial Reform in the President DJ period.

²⁷ In addition, if the new ‘investigative agency’ which was expected to handle the majority of high-profile criminal cases would also be established, prosecutors would lose almost all their rights over the investigative

transformed from the inquisitorial model of civil-law tradition to a common-law system.

Then, prosecutors violently reacted against the radical reform plans (*Gyeonghyang Sinmun* 28 April 2005). Predictably, they began to institute criminal proceedings against President MH's political faction, besides expressing a strong dissatisfaction with the plans. At that time, coincidentally, not only a legislator belonging to the OOP but also MH's closet aid, Kwang-je Lee, was suspected of intervening inappropriately in the national project for developing Russian oilfields. At first, prosecutors did not play a leading role in the criminal investigation of this suspicion, while the Board of Audit and Inspection (BAI) primarily examined the case. However, the GNP continued to denounce the ruling faction, even though the BAI could not discover Kwang-je Lee's deep involvement in the 'oil gate.' Therefore, the prosecution service took its turn to handle this scandal, and President MH also agreed that prosecutors were required to investigate the scandal, demonstrating his confidence that his faction members had not been involved in it (*Gyeonghyang Sinmun* 9 April 2005). The prosecution service had not actively coped with this scandal from the beginning, but it conducted an intensive investigation into Kwang-je Lee, after the criminal proceeding against him was once initiated.²⁸ It was understood that the prosecutors had no choice but to devote themselves to criminal proceedings against the president's closest allies, in order to protect their prerogative powers, under the pressure of reform against them (*Naeil Sinmun* 10 May 2005). As the prosecutors' investigation proceeded, an expanded suspicion that the president's other henchmen, besides Kwang-je Lee, and even the National Security Council might be connected to the 'oil gate' was suggested, and as a result, President MH was bound to lose his moral legitimacy once again, even though the involvement of his faction was rarely disclosed.

Nonetheless, President MH did not give up his long-term interest in major reform of the prosecution service but tried to keep the momentum by any means. The appointment of Jung-bae Chun, a senior legislator who had been a reformist against prosecutors, to new minister of justice was the important sign. However, it was not easy to rejuvenate the president's momentum for reform of the prosecution service, in spite of this ministerial appointment. Jung-bae Chun himself also testified, "The driving force for reform against

phase in criminal proceedings.

²⁸ The GNP strongly insisted on a special prosecutor's investigation against the 'oil gate' not long after the prosecution service had instituted the criminal proceedings, which was because the opposition party wanted to exaggerate the political scandal involving the president's faction. At the time when the prosecution service closed the criminal proceedings, the Special Prosecutor Dae-hoon Jung was finally appointed to investigate the case, but he could also not find evidences of the involvement of the president's close allies.

the prosecution service had already been weakened significantly, when I was appointed to the minister of justice in June 2005” in an interview (Moon and Kim 2011: 248).²⁹ In reality, the Minister of Justice Jung-bae Chun was eager to support the president’s reform at first, but he also often came into conflict with prosecutors. For instance, when Jeong-koo Kang, a professor of sociology at Dongguk University, was investigated on the charge of violation of the National Security Law by the prosecution service, he ordered Prosecutor General Jong-bin Kim to handle the case of Jeong-koo Kang without his arrest, relying on the principle of democratic control over the power organ and his legal power guaranteed by Article 8 of the Prosecutor’s Office Law (*Gungmin Ilbo* 14 October 2005). However, prosecutors violently criticised that the minister’s order was an inappropriate political interference, and eventually Prosecutor General Jong-bin Kim resigned voluntarily in protest (*Donga Ilbo* 14 October 2005; *Segye Ilbo* 17 October 2005). While most former prosecutors general had unofficially demonstrated their loyalty to incumbent presidents, Prosecutor General Jong-bin Kim openly made a strong voice against even a legitimate direction from President MH and the Minister of Justice Jung-bae Chun, in order to protect the collective interest of his own organisation.

<Table 4-2> Agendas for Reform of the Prosecution Service in President MH’s Period
(December 2002 – December 2007)

| Driving force | Reform Programmes against Prosecutors | Result |
|------------------------------|---|-----------------|
| President MH, and the OOP | <ul style="list-style-type: none"> ◦ the establishment of an ‘investigative agency against corrupt high-ranking state officials’ ◦ the authorisation of independent investigatory power against some kinds of criminal offence for police officers ◦ the invalidation of admissibility of evidence in the prosecutors’ investigative report about a criminal suspect in court | failure |
| | <ul style="list-style-type: none"> ◦ the adoption of the mandatory legislative hearing for the appointment of prosecutor general → the enactment of the Law on Confirmation Hearing (February 2003) ◦ the weakening of the organisational hierarchy among prosecutors → the revision of the Prosecutor’s Office Law (January 2004) ◦ the expansion of kinds of criminal case in which the prosecutors’ decision not to indict a suspect (based on <i>Opportunitätsprinzip</i>) can be officially complained about → the revision of Criminal Procedure Act (June 2007) ◦ the adoption of a limited jury system | partial success |

²⁹ The professor Bo-hack Suh also testified that President MH’s reformist force had already been exhausted in 2005, because of the prosecutors’ intentional and repeated institutions of criminal proceedings against the president’s faction, in the interview with me (25 June 2013).

In addition to this circumstance, as President MH's tenure went to its later phase, the prosecutors' defection from the president became increasingly blatant, and therefore the conflict between MH and the prosecution service became extreme. Consequently, as stated above, the legislation on the establishment of the 'investigative agency' was indefinitely postponed, and the redistributive process of investigative powers over criminal procedure between the prosecution service and the police agency could also not progress. In the adjustment process of the investigative powers, moreover, the Chief of the Police Agency Joon-young Huh, who had pushed ahead with an independent investigative power for police officers, was *de facto* dismissed, in December 2005, on the grounds that he could neither control the police officers' excessive use of force against an agrarian protest nor prevent two farmers' accidental death in the incident (*Hanguk Ilbo* 30 December 2005; *Munhwa Ilbo* 21 December 2005). Thus, even the police force could no longer provide a firm support to President MH, and consequently he lost a core partner in reforming the prosecution service.

Meanwhile, the prosecutors' institution of criminal proceedings against the president's close allies did not cease. Most importantly, the scandal of 'Sea Story' involving MH's nephew, Ji-won Roh, erupted in summer 2006. This affair began in the later part of 2005, as prosecutors ran a mere inspection on the gambling game venues which furnished a kind of slot machine, the 'Sea Story.' It was then reported that people had spent as much money on this gambling game as the defence budget for one year (*Maeil Gyeongjae* 29 December 2005). But the suspicion that there might be a corrupt relationship between the production company for the 'Sea Story' and the president's faction was raised, as it became known that the government permitted this business while having already recognised the danger of this slot machine (*Hanguk Ilbo* 19 August 2006). In particular, the fact that MH's nephew had worked as director for a company connected to the 'Sea Story' was disclosed, and therefore this affair instantly expanded into a big political scandal. While the GNP did not stop criticising President MH and people also doubted his faction, the prosecution service launched an intensive investigation into the scandal (*Donga Ilbo* 19 August 2006; *Segye Ilbo* 21 August 2006).³⁰ Indeed, the 'Sea Story' scandal could be understood as a bonus for

³⁰ Strictly speaking, the prosecution service did not initiate the criminal proceedings of the 'Sea Story' scandal, but began the investigation into this affair only when President MH ordered it. Also, prosecutors could not succeed in the indictment of any president's faction member. Hence, the GNP suspected that the prosecution service might protect the president's faction. In particular, Prosecutor General Sang-myung Jung was known to be relatively closer to MH than the previous prosecutors general. However, the GNP's doubts were not so reasonable, given that the strained relationship between the president and prosecutors had already become irreversible, and the latter had no incentive to help the former, who had no will to abandon reform against them. Rather, it can be concluded that the prosecution service could not succeed in indicting any

prosecutors. In those days, the corruption of judges and prosecutors that had hardly been detected by its nature, was receiving national attention, which would have contributed to President MH's reform of the prosecution service. However, on the one side, the 'Sea Story' scandal took away the national attention from the corruption of the judicial officers (*Munhwa Ilbo* 23 August 2006), which could make prosecutors freer from the political pressure based on citizens' preference for reform against them. On the other side, MH was bound to lose his political authority considerably, regardless of the authenticity of the 'Sea Story' scandal, as the prosecutors' thorough investigation against this case went along. The media competitively reported the suspicion that some members of the president's faction, including his nephew, might be deeply involved in the affair, and therefore the president's moral foundation was irreversibly damaged. In actuality, about 71% of the population suspected that the president's close aides might be involved in the 'Sea Story' scandal, and public popularity for MH sharply dropped to about 15% (*Munhwa Ilbo* 26 August 2006; *Naeil Sinmun* 1 September 2006). Finally, President MH was deprived of the momentum for all of his policy initiatives, including the plans of prosecution service reform.

Consequently, as noted above, the legislation on the establishment of the 'investigative agency against corrupt high-ranking state officials' was abandoned, not being passed by the National Assembly, and the bill for the redistribution of investigative powers over criminal procedure could not be even presented to the legislature during President MH's period. Although the Criminal Procedure Act was partly amended in the context of the judicial reform³¹ in June 2007, the institutional changes to restrict the prosecutors' investigative power were hardly achieved, unlike the original plan of the Presidential Committee for Judicial Reform. This revision was not necessarily insignificant, because it accompanied a change to limit the *Opportunitätsprinzip* broadly allowed to the South Korean prosecutors for the first time. But this change could rarely contribute to curtailment of the prosecutors' enormous power available for the politicisation of criminal justice, considering that only plaintiffs could protest the prosecutors' decision not to indict criminal suspects, in spite of the revision of criminal procedure. In fact, this institutional change could not significantly help to keep the prosecution service from giving immunity to a particular political faction

MH's faction member, because they were not actually involved in this scandal.

³¹ Unlike reform of the prosecution service, there were some major changes to the judiciary in President MH's period. For instance, the composition of the supreme court was more diversified; some proper experience as prosecutor or lawyer was required for becoming a judge; law schools were introduced to replace the existing state examination to select judicial officers (Lee 2007b). In particular, a limited jury system was adopted, although it would be applied only to serious criminal offences and could not even constrain judges' decision. The limited jury system would be slightly disadvantageous also for prosecutors.

or business involved in corruption, because the majority of the high-profile criminal cases would be opened by an accusation of a third party, such as civic organisations (Kim, Seo, Oh and Ha 2011: 263-265).

In short, all of President MH's attempts for major reform against the prosecution service failed. The empirical cases during President MH's period exactly confirm Hypothesis II of this thesis. Under the institutional combination of the civil-law prosecution system and presidentialism, President MH never abandoned large-scale reform against prosecutors, in spite of his persistent conflict with them during his entire tenure, unlike his predecessors. However, the prosecutors made the strong voice or organisational resistance against MH, who could not help being vulnerable to the politicisation of criminal justice, in order to protect their prerogatives as collective interest. As a result, the president not only lost his moral legitimacy and political influence steadily, but could also achieve no major reform of the prosecution service.

President MH's 'lame duck' period, retirement, and death

After the repeated failures of reform against the civil-law prosecutors, President MH could not avoid a serious decline during the last phase of his tenure, like the other outgoing presidents, because of his henchmen's corruption emerging in late 2007. In particular, the sensational fact that the Chief of the Policy Chamber of Presidential Administration Yang-kyoon Byun had unlawfully supported a young female curator, Jung-ah Shin, for her rapid social development, including her employment at Dongguk University, and they had even maintained an immoral intimacy was revealed by prosecutors. It was also disclosed that she had fraudulently acquired her degree from Yale University (*Gyeonghyang Sinmun* 11 September 2007; *Hanguk Ilbo* 11 September 2007). This affair rapidly turned into a major political scandal. Then, the attitude of the prosecution service towards this scandal was very aggressive. While courts consecutively refused to allow prosecutors a seizure and search warrants against Yang-kyoon Byun, and a detention warrant against Jung-ah Shin, prosecutors stuck to the warrants, violently criticising the judges' decisions (*Hanguk Ilbo* 14 September 2007; *Hangyeore Sinmun* 19 September 2007). Jung-ah Shin (2011: 344-347) also testified, "The prosecutors consistently urged me only to confess that Yang-kyoon Byun had supported me" in her retrospect. According to a columnist Bum Lim, the then prosecution service seriously damaged the presumption of innocence as well, by leaking the progress of the criminal investigations against them (*Hangyeore Sinmun* 29 September

2007: 31).³² Indeed, it was not an irrational choice for prosecutors to exercise their wide power against MH's faction in the last phase of his tenure, although the relationship between the president and the prosecution service had continuously been poor. With this sensational scandal, some of President MH's close aides, such as Presidential Protocol Assistant Yoon-jae Jung, were also indicted in his last months, and consequently the 'lame duck' presidency was accelerated (*Munhwa Ilbo* 19 September 2007).

In the circumstance where the president and ruling faction lost popularity significantly, Myung-bak Lee, the candidate of the GDP, defeated Dong-young Jung, the candidate of the ruling party, by a wide margin, in the presidential election in December 2007. President MH finished his official term with a gloomy air, failing to regain the presidential authority, unlike his predecessor, DJ. However, the ill-fated relationship between prosecutors and MH was not over even after his retirement. About one year after his retirement, the prosecution service began to institute criminal proceedings against some members of the president's faction and family, and subsequently his brother Gun-pyung Roh, his sponsors Kum-won Kang and Yeon-cha Park, the close aide Kwang-je Lee, and others were arrested or prosecuted. A considerable number of them had really flouted laws and were therefore given a guilty verdict in courts, but it could not be completely denied that the prosecution service was misused for the politicisation of criminal justice. For example, under President Myung-bak Lee, prosecutors indicted Myung-sook Han, who had served as prime minister in President MH's period, on the charge of two corruption cases, and repeatedly lodged appeals on the cases, but she consecutively received the sentence of non-guilty from judges (*Hangyeore Sinmun* 15 March 2013). MH also pointed out that members of his political faction could not help but suffer such insults from the prosecution service due to his failure in reform of the power apparatus, in his autobiography (Roh 2010: 274-275). Although it is not yet clear whether MH himself was actually involved in corruptions or not, he finally killed himself when the prosecutors' investigation was approaching him.

4. 3. Summary

This chapter has sought to explain why major reform to curtail the prosecutors' extensive power over criminal procedure could hardly be attempted, or only minor changes of the

³² In addition, some of the mass media relentlessly drove this case to a sex scandal, covering Jung-ah Shin's naked photo.

institutional power could be launched and achieved, as well as why an incumbent president could not succeed in major reform against them, despite his solid reform will and policies, under the institutional combination of presidentialism and a civil-law prosecution system. The first part in which major reform of civil-law prosecution service could hardly be tried was explained via the analysis of empirical cases during President YS's and DJ's periods. This was to confirm Hypothesis I-2 of this thesis: under the institutional combination of presidentialism and a civil-law prosecution system, if political competition is high and an incumbent president seeks to abuse the prosecutors' enormous power, any major reform plan against the prosecution service would be suspended. The second part in which even a reformist president would have a difficulty in reforming the prosecution service was confirmed via the analysis of the empirical cases in President MH's period. This was to confirm Hypothesis II of this thesis: under the institutional combination of presidentialism and a civil-law prosecution system, if political competition is high and an incumbent president does not abandon major reform against prosecutors, they would bring criminal proceedings even against him to protect their collective interest not in his last phase but from the beginning of his tenure, and consequently his reform would fail.

To begin with, President YS had no will to reform against the civil-law prosecutors during his tenure. In contrast, the opposition parties, such as the DP or the NCNP, had an incentive to launch reform of the prosecution service, for preventing the politicisation of criminal justice against them. However, the opposition parties, which had almost no control over the prosecutors' careers, were inevitably much more vulnerable to the prosecutors' enormously broad power over criminal procedure than the president, when the prosecutors selectively targeted the reformist forces. As a result, no reform against the prosecution service was achieved during President YS's period. Unlike YS, President DJ tried to reform against the power apparatus right after winning the presidency. However, he also neglected his long-term interest in major reform against the civil-law prosecutors but committed to his short-term interest in misusing them, owing to the probability of their defection against him in the circumstance of the judicialised politics, especially through the criminal proceedings against the 'cloth lobby' scandal. President DJ no longer pursued any large-scale reform of the prosecution service. These empirical cases during the two presidents' periods generally correspond with Hypothesis I-2 of this thesis.

On the other hand, President MH not only refused to pursue the short-term interest in exploiting the civil-law prosecution service from the beginning of his tenure, but also did

not abandon his long-term interest in reform against the power apparatus throughout his entire tenure, unlike his predecessors. Expectedly, prosecutors brought a strong voice and organisational resistance against the president, in order to protect their collective interest. Due to the corruption scandals, involving core members of his faction, repeatedly disclosed by the prosecution service, President MH who was vulnerable to the judicialisation of politics via criminal proceedings, under the serious political competition, steadily lost his moral legitimacy as well as political influence. As a consequence, all of MH's attempts at major reform of the prosecution service failed. The empirical cases in the President MH period exactly confirmed Hypothesis II of this thesis.

Chapter V: Presidents' abuse of the prosecution service, and the politicisation of criminal justice in Russia

This chapter aims to explain why prosecutors often exercise their far-reaching power in favour of an incumbent president, but betray him in the last phase of his tenure, whereas they serve another president even in his last phase, under the institutional combination of a civil-law prosecution system and presidentialism, through an empirical analysis of the Russian cases after democratisation. According to Hypothesis I-1 of this thesis, if political competition is high and an incumbent president seeks to abuse the civil-law prosecutors' enormous power, they would manipulate criminal proceedings in favour of him during most of his tenure, but betray him in his last phase. This hypothesis was already confirmed through the South Korean cases in Chapter III, but this chapter also attempts to confirm it through the Russian cases. According to Hypothesis III of this thesis, on the other hand, if political competition is eliminated, civil-law prosecutors would not betray an incumbent president in the last phase of his tenure, let alone forming an organisational resistance against his reform. To test these two hypotheses, first of all, this chapter describes the prosecution service which contained the core features of a civil-law prosecution system, and the presidential system which enabled a current president to control the executive branch almost monopolistically, as the two institutional preconditions for the alliance or split between an incumbent president and prosecutors, in Russia after democratisation. Secondly, this chapter empirically explains why Russian President Boris Yel'tsin could utilise prosecutors for the politicisation of criminal justice in favour of him during most of his tenure, but encountered their defection in the last phase of his second term, under the institutional combination of presidentialism and the civil-law prosecution system. Thirdly, this chapter empirically explains why Russian President Vladimir Putin was unusually not faced with the civil-law prosecutors' betrayal to the end of his second term, unlike the other presidents in South Korea and Russia after democratisation, even under the common institutional combination.

5. 1. Institutional preconditions for main actors' strategic behaviour

5. 1. 1. The Russian Prosecution System

The far-reaching power of the prosecution service

In Russia, the Communist Party regime had abused the prosecution service (Procuracy) as one of the most crucial power bases, in order to secure its survival and authority, from the Soviet era (Diehm 2001).¹ The Soviet Prosecution Service carried out its own two tasks (Smith 1996: 106-107). First, the prosecutors had to ensure proper execution of the policies from the party leadership, through their general supervision over the federal and local officials' illegal activities. As mentioned below, the party leaderships, Joseph Stalin in particular, used to rely on the moral and ideological discipline – through ruthless purges and combat ethos – in motivating the state bureaucrats to successfully accomplish its goals, such as modernisation or collectivisation, given the indispensable weakness of bureaucratic discipline over the Soviet officials. Then, the support of some federal law enforcement agencies, such as the KGB and the prosecution service, was also necessarily required, and the prosecution service played the greatest role, among them, due to its legal supervision power. But the Soviet Prosecution Service took a more critical function for the survival of the undemocratic regime, by controlling criminal proceedings against political resistances, as under the authoritarian regimes in South Korea (Chen 2004: 432-438; Greenberg 2009: 11-12). The party leadership could effectively destroy the opposition forces by ordering prosecutors to charge them and conduct their speedy execution and imprisonment, even under the name of the rule of law. However, not all types of prosecution service can be allowed to manipulate criminal proceedings. As discussed in previous chapters, civil-law prosecutors can do it more easily than common-law ones, relying on their far-reaching power over criminal procedure. Likewise, such extensive power of the Russian Prosecution Service was preserved, with no major change, during the entire totalitarian era, since the first enactment of the Criminal Procedure Code based on a civil-law prosecution system in 1922. In particular, the Soviet prosecutors could be permitted to exercise more extensive power in criminal proceedings – in order to serve the totalitarian leadership effectively – than their counterparts in any other civil-law country, who restrict their arbitrary power to a

¹ The Russian Prosecution Service has its origin in the tsarist era, but its main features of a civil-law prosecution system came from the Soviet Prosecution Service. Thus, the features of the Soviet Prosecution Service are briefly explained in this section.

certain extent through some institutional checks.

However, a critical point is that the Russian Prosecution Service maintained the enormous power and unusually high prestige almost identically to the previous system, even since democratisation, as in South Korea.² Along with the collapse of the Soviet Union and the enactment of the 1993 Constitution (Konstitutsiya RF), there were some revisions of the laws on the prosecution system, but the statutes of the Soviet era persisted to be a central frame for the Russian criminal justice system, until the later phase of President Putin's second term. For instance, prosecutors are still able to supervise the execution of laws by federal and local governments. The Federal Law on the Prosecutor's Office (Federal'nyi Zakon RF o prokurature Rossiiskoi Federatsii) was enacted in 1992 and often amended afterwards, but it could not be understood to reduce their vast power. In addition, though a new Criminal Procedure Code (Ugolovno-protsessual'nyi kodeks RF) was barely enacted and included some revisions to actualise judges' position in trials in 2001, the code could also not be regarded as containing any radical change, compared to the past version (Butler 2009: 277; Greenberg 2009: 12-21). Until the drastic revision of the Criminal Procedure Code and Federal Law on the Prosecutor's Office in June 2007,³ the Russian prosecutors had held quite a wide jurisdiction, including the power to control all investigative agencies during investigations, the investigatory force of their own, the exclusive right of indictment, and even the guarantee of *Opportunitätsprinzip* (Mikhailovskaya 1999). The combination of these prerogatives still enabled them to exercise more extensive power over criminal procedure, even after democratisation, than their equivalents of other civil-law countries.

To begin with, the Russian Prosecution Service actually dominated the stage for a criminal investigation. The investigative officers from various law enforcement agencies, such as the police in the Ministry of Internal Affairs (MVD), the Federal Security Service (FSB),

² On 15 November 1991, the Russian Prosecution Service was officially created as a unified organ, taking away jurisdiction over all the agencies and institutions on the Russian territory from the Soviet Prosecution Service (Butler 2009: 194).

³ The radical amendment of the Criminal Procedure Code and the Federal Law on the Prosecutor's Office in 2007 will be dealt with more in detail in Chapter VI, which focuses on reform of the Russian Prosecution Service. On the other hand, I refer mostly to the 2001 Criminal Procedure Code, in describing the Russian prosecutors' far-reaching power over criminal procedure in this section, because this version not only represented their jurisdiction originating from the Soviet era, but also continued with no major change until 2007. That is, the then prosecutors' power over criminal procedure was still much wider than that of their equivalents in any other civil-law countries, though professor Bill Bowring, who had worked for drafting a new Russian criminal procedure in the Council of Europe, stated that the 2001 Criminal Procedure Code could be regarded as not a small change from the Soviet criminal justice system, in an interview with me (2 December 2013).

and so on,⁴ could only play a secondary role in investigating criminal cases, according to the Criminal Procedure Code (Article 37; 38; 39). The investigators could neither initiate a criminal proceeding nor launch a preliminary inquisition without the prosecutors' consent (Article 20; 146). All the prosecutor's written directions were also naturally obligatory to the investigators during this stage (Article 37). In particular, the investigators had no choice but to appeal prosecutors when obtaining an arrest (custody) or detention warrant from judges (Article 91; 108).⁵ In addition, prosecutors could withdraw a criminal case from any bodies of investigation, and reassign it to their own investigative officers for controlling specific criminal cases exclusively (Article 37). The heads of the investigative bodies could also give orders or instructions to their subordinate investigators, and transfer a criminal case from one investigator to another (Article 39). Nonetheless, the prosecutors' power to control investigations was not constricted, given that their directions bound on the heads of the investigative bodies as well (Butler 2009: 286). Most of all, the code did not permit an investigator to autonomously terminate a criminal proceeding, whereas only a prosecutor could make an ultimate decision on the termination (Article 213; 214). The investigator could decide not to prosecute on less serious offences but had to acquire the prosecutor's consent even in these cases. Therefore, the Russian Prosecution Service had remained the dominant player in the phase of a criminal investigation, at least until the major reform of this power apparatus in June 2007.

However, the investigative power of the Russian Prosecution Service *per se* should not be overemphasised as a unique power resource, because civil-law prosecutors generally have the comprehensive jurisdiction from investigation to indictment over criminal procedure. Rather, as the prosecutors' investigatory powers were combined with their enormous power in the stage of indictment, too much power in criminal proceedings could be allowed for them. According to the 2001 Criminal Procedure Code, the Russian Prosecution Service was guaranteed not only to hold the exclusive right to indict a criminal suspect, but also to decide whether or not to indict him for a trial on account of *Opportunitätsprinzip* (Article 221), as in South Korea. Considering that even common-law prosecutors, who can rarely exercise the power for criminal investigation, have to share the right to decide whether or not to indict a criminal suspect with the grand jury, only the combination of the exclusive indictment and *Opportunitätsprinzip* could in fact grant a huge power to prosecutors in

⁴ Indeed, the prosecution service retained 18,000 investigators of its own (Whitmore 2007).

⁵ Before the enactment of the 2001 Criminal Procedure Code, surprisingly, prosecutors had been able to make an autonomous decision on putting a criminal suspect to arrest or custody without the permission of judges in Russia (Yasin 2012: 383). For this institutional change, Chapter VI will give a more detailed explanation in the context of judicial reform.

Russia. Therefore, they could do almost everything at least throughout the pre-trial stages of criminal proceedings until June 2007.

Yet, the most important point, regarding the Prosecution Service in Russia at that time, is that the prosecutors' enormously wide power over criminal procedure could intensify the danger of the politicisation of criminal justice, if they are induced not to be impartial but to hold a partisan position. That is, the prosecutors could actually initiate and manipulate criminal proceedings against certain politicians and social forces, while giving immunity to the others' illegal behaviours, with their own timing and extent. Moreover, in high-profile criminal cases, defence lawyers might even find themselves under forceful repression, including being searched, bothered and intimidated by the prosecutors, as reported by the *Washington Post* (21 April 2004). In addition, the presumption of innocence was often broken before the judges' ultimate decision, as prosecutors could intentionally leak the information of their targets to the press which were struggling to report political scandals, as in South Korea (*Nezavisimaya Gazeta* 3 April 1999). In practice, a politician or civil force, targeted by the prosecutors, used to lose a considerable part of his moral legitimacy and political support, because of their political distortion of criminal proceedings. Hence, in Russia after democratisation, prosecutors could often abuse their enormous power to unduly influence national elections as well as ideological contests in civil society, in favour of a particular political faction such as an incumbent president's circle, big businesses, or itself, until the reform of the prosecution service in June 2007 (*Novaya Gazeta* 26 April 2007).

The half-faced organisational hierarchy of the prosecution service

In Russia, the prosecution service officially entails a firm organisational hierarchy, as in typical civil-law countries. In the pyramid-like organisational setup where a prosecutor general is at the top, all the higher ranker's instructions, directives and orders are strictly obeyed by lower rankers. Indeed, as the Federal Law on the Prosecutor's Office rules, "The Prosecutor's Office of the Russian Federation shall be a single, federal, centralised system of bodies exercising on behalf of the Russian Federation supervision over compliance with the Constitution of the Russian Federation and execution of the laws in force within the territory of the Russian Federation" (Article 1).⁶ As noted previously, this provision was specified to enable the totalitarian regime to hierarchically control the prosecution service,

⁶ Interestingly, the uniformity and centralisation of the Russian Prosecution Service is defined also in the 1993 Constitution.

through the prosecutor general and other top rankers, for the purpose of their own political ends. Vladimir Lenin also stressed its uniformity and centralisation, fearing the penetration of external influences at federal as well as local levels, from the beginning of the Soviet Prosecution Service (Smith 1978: 13-14). Even after the collapse of the Soviet system, the principle has contributed to the strong organisational hierarchy of the prosecution service to a certain extent. Although the Federal Law on the Prosecutor's Office was also amended along with the reform against the prosecution service in 2007, the organisational hierarchy among prosecutors *per se* was not radically changed.

According to the Federal Law of Prosecutor's Office, specifically, a prosecutor general can ultimately manage all the tasks of the prosecution service, and the chiefs of provincial prosecutor's offices equivalent to the federal subjects can also do this in their jurisdiction, on the basis of the power to command and supervise their own office (Article 17; 18). That is, the top-ranking prosecutors' instructions, directives and orders are binding on all of their own subordinates. In particular, as the chiefs are allowed the power to distribute criminal cases to specific prosecutors, divisions and departments within their own office, they can withdraw a criminal case from a prosecutor or a division who does not match up to their order, and reassign the case to another, for unified directions of the organisation. In addition, they can control the execution of budgets for their own office, within the limit of revenues set by the prosecutor general. In this situation, it is not easy for lower-ranking prosecutors to disobey their superiors, especially the top rankers, as in South Korea.

Unless the career advancement system for prosecutors is thoroughly based on objective criteria – such as seniority and professional performance – as in South Korea, however, the bureaucratic discipline over them cannot help but be weakened, and correspondingly the organisational hierarchy is likely to be undermined, in spite of the legal provisions for the hierarchy. In the Soviet era when the state officials' career promotion depended more on their political commitment as assessed by party-cadres, through the famous *nomenklatura* system, at the various levels of federal and local governments – which will be explained again – than on procedural and impersonal mechanisms, the organisational hierarchy of the Russian Prosecution Service was also undermined to some degree. Officially, a prosecutor general could appoint all other prosecutors for temporary terms and subsequently they were accountable only to him, but the chief of a provincial or local prosecutor's office at republics, krais, oblasts, and cities actually recruited and advanced his own subordinate prosecutors for an indefinite term (Murashin 1972: 103). The prosecutors, who were at any

rate assessed by professional experts of the same kind, would have a stronger incentive to satisfy the objective criteria for bureaucratic discipline than other state officials, who were personally subordinate to the party-cadres.⁷ Nevertheless, they also could not help but become personally subject to their superiors in a similar way. This tendency increasingly brought the fragmentation and factional conflicts, also within the prosecution service, to a certain extent, though the prosecutors, like the KGB officers, were more likely to preserve their organisational unity than any other kind of state officials, because of the intrinsic hierarchy of this power apparatus. Even since democratisation, obviously, the ambiguous bureaucratic mechanism of the Russian Prosecution Service, as a totalitarian legacy, have weakened its organisational hierarchy and instigated different factions to appear at federal and local levels, despite its legal principle of the uniformity and centralisation.

The Russian Prosecution Service accompanies as many as 11 ranks of bureaucratic career ladder: the prosecutor general, the deputy prosecutor general, the chief of a republic or krai prosecutor's office, the chief of an oblast prosecutor's office, the chief of a city or district prosecutor's office, the deputy chief prosecutor, head prosecutor, superior prosecutor, prosecutor, superior investigator, investigator (Butler 2009: 197-198).⁸ But a prosecutor is not essentially promoted to upper ranks in accordance with his seniority and professional performance. For instance, both a law professor Alexei Kazannik and young prosecutor Alexei Ilyushenko (36 years old), who had little careers in the prosecution service, could be unpredictably appointed to the prosecutor general – irrespective of their seniority or professional records – by President Yel'tsin (Smith 1996: 126-127). In addition, even the number of important posts such as the deputy prosecutor general is so changeable. Hence, even the dense bureaucratic career ladder cannot give prosecutors stable career prospects, and correspondingly discourage them to get advanced to upper ranks, although the small number of the top-ranking positions will still promise high salary, prestige and personal influence for them to a certain degree. Therefore, the organisational hierarchy is bound to become fragmented significantly.

⁷ For example, the important objective criterion for a prosecutor's career promotion was how many cases had been cleared by him, which resulted in the manipulation of criminal proceedings, in the Soviet period (McCarthy 2010: 13-14). Even though this criterion might contribute to strengthening the organisational hierarchy of the prosecution service to a certain extent, it could not totally offset the essential defect of the *nomenklatura* system.

⁸ In Russia, a top-ranking prosecutor generally means who holds a rank of the prosecutor general, the deputy prosecutor general, and the chief of a provincial prosecutor's office. Then, for instance, the head of a department of the Federal Prosecutor's Office has an equal rank with the chief of a republic prosecutor's office. And, a senior prosecutor could generally be regarded as one of the deputy chief prosecutors or head prosecutors in the prosecutor's offices of republics, kraies and oblasts.

Moreover, the prosecutor general can theoretically advance all his subordinate prosecutors to higher ranks, but the chief of a provincial or local prosecutor's office⁹ actually controls his subordinates' fate in the majority of cases, because most prosecutors develop their life-long career in only a region, unlike in South Korea where prosecutors usually have to be transferred to other regions every two years. For example, Vladimir Ustinov and Yurii Chaika had experienced most of their career as prosecutors in the areas of Krasnodar and Irkutsk respectively, though both could eventually move to Moscow with their promotion to top-ranking posts. In addition, many prosecutors have had no less incentive to form a corrupt alliance with an external influence and attack the others, than to pursue their promotion to top-ranking positions in the Federal Prosecutor's Office, since they became more dependent than ever on material subsistence offered by their provincial or local government, or even businesses, due to the miserable economic and budgetary conditions of the early post-totalitarian era (Gel'man and Senatova 1995: 218; Huskey 1999: 203; Taylor 2007: 429).

As a result, on the one hand, the fragmentation, corruptions and factional conflicts within the prosecution service were intensified, and at the same time its organisational hierarchy was increasingly weakened in a vicious cycle. However, on the other hand, the half-faced organisational hierarchy could prevent prosecutors from holding a unified partisan position in Russia, unlike in South Korea. Nonetheless, they are unlikely to have much difficulty in making their collective action, such as an organisational resistance against an incumbent president, to protect their collective interests, although they cannot make a collective action as coherently as in South Korea where the organisational hierarchy among prosecutors is stronger than that among them.

5. 1. 2. The Russian Presidency

The president's constitutional power to compose the executive branch

After one year from the Declaration of State Sovereignty of the Russian Federation, the presidential post was introduced, for the first time, through an all people's referendum in April 1991. The foundation of a presidential system was not only a political offshoot of Mikhail Gorbachev's Soviet Presidency, but also a part of wider tendency toward the form

⁹ In particular, according to the 1993 Constitution, the chief of a provincial prosecutor's office is required to obtain the consent of the federal subject for his appointment (Article 129), though this seems only a ritualistic procedure.

of government in the former Soviet republics (Huskey 1999: 25; White 1995). In June 1991, Yel'tsin obtained the presidency in a landslide, winning about 60% of entire votes, relying on a popular sentiment of anti-communism. In addition, as the 'August *coup*' was stricken by a reactionary pro-Soviet faction, he could take advantages of this opportunity as a newly elected president, and consequently even received extra-ordinary law-making authority to carry out rapid economic reform. However, the institutional power base of this first Russian Presidency was not so strong, given that the 1978 Constitution of Russian Soviet Federated Socialist Republic (RSFSR) still secured the superiority of the parliament, the Congress of People's Deputies (CPD) and Supreme Soviet (Moser 2001: 76; Sharlet 1993: 319). Though the constitution was revised along with the adoption of a presidential system, the term 'head of state' was not contained, and the presidency was referred to as merely the 'head of executive power' or the 'highest official.'

Hence, the stalemate between President Yel'tsin and the Supreme Soviet could not easily be resolved, and the political conflict increasingly became fierce. Since the 'shock therapy' for economic transformation led by the young Deputy Prime Minister Yegor Gaidar could not help but impose a considerable short-term cost on populace, the public support for Yel'tsin sharply declined, and the parliament also began putting a break on the president's actions. In particular, his virtually unchecked presidential decrees angered the Supreme Soviet (Remington 2001: 99). As even Vice-President Alexander Rutskoi sided with the conservative opposition against the presidential initiatives, Yel'tsin made an important concession by scaling back the young economists' radical economic reform programme. Nonetheless, when he insisted on renewal of extra-ordinary power for economic reform, the Supreme Soviet violently rejected it. Furthermore, President Yel'tsin could have been deprived of his cabinet, because the first Russian Presidency contained the features of the 'president-parliamentary' system, which granted the president unrestricted power to select and dismiss ministers, but also permitted the legislature to remove the cabinet with a vote of no-confidence, rather than the characteristics of a pure presidential one (Shugart 1993: 31). As a stalemate over the issue of which one should have ascendancy over another was not resolved, the Chief of the Constitutional Court Valerii Zor'kin attempted to mediate between the two democratic bodies. Hence, on the one side, Yel'tsin consented to replace Gaidar with Viktor Chernomyrdin, who had a long career and experience in the Soviet gas industry. On the other side, Ruslan Khasbulatov, the leader of the Supreme Soviet, agreed to hold a referendum, which would confirm whether the president or the parliament should be the dominant political branch, in April 1993.

However, the referendum could also do little to resolve the political deadlock, because the outcome of the popular vote fell short of the rate required for a constitutional change. Then, Yel'tsin regarded the outcome as a verdict that justified a new constitution which would grant the president much more power than the legislature, and unilaterally attempted to draft a constitution for the strong presidency (White 1995: 162). By contrast, the Supreme Soviet fiercely opposed this presidential design. The branch tried to impeach Yel'tsin, and even installed Vice-President Rutskoi as an acting president. Ultimately, President Yel'tsin coercively incapacitated the resistance, dissolving the legislature through his decree, and ordering the army to repress the opposition forces in October 1993. In December 1993, finally, the constitution which permits a president to exercise far-reaching constitutional power was newly adopted, while there was a debate over whether the constitution could be endorsed by slightly more approvals than 50% of the entire electorates.

The 1993 Constitution guarantees the Russian President's comprehensive power to form the executive branch (Article 83). An incumbent president can select all his ministers and preside over sessions of the Government *de facto* autonomously from any other political branches, as in South Korea. The State Duma (lower house) hardly holds an initiative to compose the executive branch. The legislative branch is able to refuse the nomination for the post of prime minister, but the effect is considerably restricted, since the president can dissolve the legislature when it consecutively rejects the nominee for the position three times (Article 111). Also given that the constitution permits the president to dismiss the prime minister, the latter can be understood to be *ex post* responsible mainly to the former. Hence, the prime minister seldom has to show loyalty to political factions other than the current president and his faction. In addition to the appointment of a prime minister, an incumbent president can choose the other ministers with no confirmation of the legislature. Although the constitution allows the State Duma the authority to propose a vote of no-confidence against the executive, the president can ignore the proposal of the legislature, and even dissolve the branch if another no-confidence is suggested again within three months (Article 117). Thus, the president has almost no occasion to hand over the priority in forming a cabinet to the legislature, when he faces a parliamentary majority opposition, unlike in the French-style dual executive system.¹⁰ For instance, the pro-communist-led

¹⁰ The Russian Presidency is clearly distinguished from the 'premier-presidential' system in France, but it may be regarded as the 'president-parliamentary' one. Yet some factors, such as the lack of a cohesive party system or the presidency's tremendous advantageous position for forming a cabinet, significantly undermine the attributes of the 'president-parliamentary' system, and make it closer to a pure presidential system.

State Duma distrusted Sergei Kirienko but finally accepted him as prime minister in order to prevent its dissolution. Indeed, the State Duma could never remove the executive nor create a true cohabitation government under the 1993 Constitution.¹¹ Although Article 112 of the 1993 Constitution grants the prime minister the right to recommend the candidates for deputy prime ministers and ministers to the president, this does not make much sense, given that the former is institutionally subordinate to the latter. In other words, a Russian President is able to select the figures for all the chief positions of the cabinet, based on his own preference. Furthermore, the president can actually dominate all the decision-making processes within the executive branch, because the sessions of Government are formed of the ministers who can be regarded as being *ex post* accountable only to him.

Additionally, the Russian President's power to select the nominees for key state positions is not limited to ministers of the executive branch. The 1993 Constitution grants the president the right to appoint the candidates for the chiefs of federal law enforcement agencies, and even the judicial bodies. Specifically, an incumbent president can choose the chairman of the central bank, the prosecutor general, and the supreme and constitutional judges, though the consent of the Federal Council (upper house) or the State Duma is required for these appointments (Article 83). Then, it could be said that the presidential power to appoint candidates for the core state posts will be considerably restricted in a divided government, because the legislature exercise the right to approve the nominations (Article 102; 103). Moreover, as discussed above, a presidential system *per se* often brings about divided governments, and can intensify political conflicts. As a consequence, there remains the possibility that the legislature dominated by opposition parties would drag a president down, consistently vetoing his nominations for the key state posts. That is, the president might repeatedly fail to appoint his preferred nominees for the core state positions in the situation of a divided government, which could lay a political burden on him in Russia.¹²

However, a legislature dominated by opposition parties cannot continuously refuse the

¹¹ On the other hand, Yel'tsin wanted to appoint Chernomyrdin to the prime minister again, after dismissing Kirienko, but he was rebuffed twice by the State Duma in August and September 1998. Then, he did not take a risk by subjecting Chernomyrdin to the final legislative confirmation, but conceded a part of his authority to compose the executive to the legislature by nominating another candidate, Yevgenii Primakov who was enjoying a broad support from the State Duma. But it cannot be said that a true cohabitation government was formed even during the Prime Minister Primakov period, since the majority of the other ministers were still President Yel'tsin's loyalists and Primakov might also not be the most preferred candidate of the legislature. Above all, this case could be understood as an exception, attributed to some unusual factors such as Yel'tsin's health problem and serious economic crisis at that time. In particular, then the president's standing in the opinion poll was also significantly low (Mazo 2005: 175-178).

¹² In addition, the State Duma and the Federal Council can exercise their initiative to select half of members of the Chamber of Accounts, respectively (Article 102; 103).

president's nominations, because it will also be blamed for the continuous refusals. When a Russian President faces the veto of the legislature on some of his political appointees, he has no constitutional duty to abandon his initiative to choose the chiefs of key state organs, as well as to compose a cabinet. Hence, a political burden would be imposed on both sides, though the impasse between the two democratic bodies occurs. After all, the president can assign his preferred nominees to the important state posts after the failure once or twice. Moreover, the president is likely to have a comparatively less difficulty in appointing the supreme and constitutional judges, and the prosecutor general, considering that the Federal Council retains a weaker capacity for collective action than the State Duma because the chiefs of provincial executives and legislatures, or their representatives – who infrequently belong to any political party – can automatically acquire membership of the upper house.¹³ Although the Federal Council has the right of veto also on the dismissal of a prosecutor general (Article 102), it could neither actually protect him nor secure his political neutrality. Instead, the Russian Presidents have generally been understood to overwhelm the judiciary and prosecution service (Greenberg 2009: 18-19; Huskey 2005: 171-173).¹⁴

In short, the Federal Council and the State Duma attempt to approve the most non-partisan nominees for the posts of prime minister and chiefs of other important state agencies, but the president's *de facto* exclusive power to compose the executive leadership and appoint his preferred figures for the other highest-ranking state positions could not be substantially undermined. Indeed, the Russian President's constitutional power is a resource that makes the executive branch and the other powerful state bodies hold a partisan position in favour of him. However, politicised bureaucrats, owing to the factionalisation based on patron-client networks throughout the federal, provincial and local levels, may keep a president from effectively exploiting the state bureaucracy for his preference, unlike in South Korea. In the next, this notable feature of Russia is explained.

¹³ In particular, at first, President Yel'tsin chose the chiefs of provincial executives by himself, and therefore his influence over the Federal Council was secure. But the upper house could obtain more autonomy than before, since the provincial governors began to be directly elected in 1996. Thus, it occasionally came into conflict with President Yel'tsin around some issues, such as the dismissal of prosecutors general. Nonetheless, the Federal Council consistently remained less confrontational than the State Duma (Moser 2001: 86). In addition, the upper house has increasingly lost its autonomy, along with Putin's federal reforms (Ortung 2004).

¹⁴ Although President Yel'tsin could not officially dismiss Prosecutor General Yurii Skuratov, owing to the disapproval of the Federal Council, within his term, he could suspend his authority through a presidential decree and even appoint an acting prosecutors general. This is explained more in detail in the next section.

Fragmentation and factional conflicts based on patron-client ties and the president's inexhaustible control over the state bureaucracy

According to Friedrich and Brzezinski (1956), the state bureaucracy worked as a major instrument of political, economic, and military controls in the Soviet era. The one-party system, monopolistic ownership, and the centrally planned economy that characterised the totalitarian regime could not practically be embodied without an appropriately functioning bureaucracy. Hence, how the gigantic and prominent state bureaucracy could be suitably controlled was one of key tasks for the party leadership in order to bring good governance and accomplish its ends in the Soviet politics. As noted above, however, the organisational hierarchy of the Soviet bureaucracy was never founded on procedural and impersonal mechanisms in the Weberian sense, such as merit system and legal-formalism (Pakulski 1986; Urban 1997: 6-14), and correspondingly the state officials' career advancement also depended mostly on their political commitment as assessed by the party-cadres through the *nomenklatura* system. Thus, coupled with the essential deficiencies of the centrally planned system (Kornai 1992; Nove 1986), the weak bureaucratic discipline had the potential of undermining the organisational hierarchy and limiting the party leadership to effectively achieve its goals.

For that reason, the General Secretariat of Communist Party of the Soviet Union (CPSU) Stalin imposed the moral and ideological disciplines from the "charismatic impersonalism" on the *nomenklatura* through the party-cadres, and preserved a strong hierarchy of the state bureaucracy, by executing purges and sustaining a combat ethos (Jowitt 1983). Through the then non-bureaucratic but strongly disciplined hierarchy, the state officials could be substantially encouraged to make a commitment to the targets of the party leadership, such as the rapid industrialisation or ideological propaganda. Yet, even the hierarchy of the state bureaucracy was weakened, as the *nomenklatura*, especially the party-cadres themselves, lost their disciplines because of the routinisation of the charismatic legitimacy, throughout Nikita Khrushchev's and Leonid Brezhnev's periods (Jowitt 1983: 285-286). The senior state officials' – in particular, the party-cadres' – charismatic influence over the juniors increasingly deteriorated into the former's indisciplined and personal domination over the latter. Consequently, the state bureaucrats became fragmented and factionalised.

Although high-ranking bureaucrats could not help being politicised to some degree in any political system (Hojnacky 1996: 141-142), the degree would be different among regime types. In an authoritarian regime, senior bureaucrats might devote loyalty to the political

leadership, whereas juniors would generally work hard to bring a good performance. In South Korea, as stated in Chapter III, this tendency has obviously continued even after democratisation. In totalitarian regimes, by contrast, even junior bureaucrats were bound to be subject personally to party-cadres at the various levels of federal and local governments, let alone the seniors loyal to the highest party leadership, when the moral and ideological discipline was taken away from the state bureaucracy. In the Soviet state bureaucracy, as a result, the fragmentation and factional conflicts based on multiple patron-client networks became prevalent, and the non-bureaucratic but quite strong hierarchy was also weakened. In parallel with this weakening of the chain of command, the state bureaucracy became increasingly penetrated by emerging private interests from the second economy, and hence individual state officials became seriously corrupted (Ledeneva 1998).

Even after the totalitarian regime collapsed and democratisation went along, the Russian state bureaucracy still accompanied the fragmented hierarchy. Not only conflicts between federal ministries and between provincial or local governments, but also factional networks within and across the formal organisational boundaries were already widespread (Kirkow 1995: 923; Stark and Nee 1989: 15). Then, the Russian Presidency, as a new leadership body, had few choices but to make full use of his constitutional appointment power over the top-ranking positions in ministries and other federal law enforcement agencies, and even regional governments, in order to secure his own domination over the federal as well as the regional bureaucracies, like the leaders of the Communist Party. More importantly, President Yel'tsin utilised the strategy of 'divide and rule' or 'advance, dismiss, and rule' to extract maximum loyalty from top-ranking state officials, which could not bring a coherent state bureaucracy but only contribute to his 'patriarchal' authority, given that he had to attract different political forces under a political polarisation¹⁵ (*Kommersant* 15 April 1995). By its nature, the composition of the cabinet was unpredictably reshuffled, and consequently the top-ranking bureaucrats' political fate was precarious. Under this ruling pattern, moreover, junior bureaucrats or young academicians such as Kirienko or Gaidar, who had accrued neither a long career nor sufficient experience in their relevant fields, were often singled out for ministerial-level positions, although senior state officials were also advanced to the top-ranking posts, as in South Korea (*RFE/RL Newslines* 30 June 1998; Shevchenko 2004: 69, 80). As a result, President Yel'tsin aggravated the fragmented state bureaucracy, via his ruling strategy, in a vicious cycle. That is, the first Russian President overlooked the defect of fragmented federal and regional bureaucracies, but only tried to

¹⁵ A next section will more elaborately account for the political polarisation in early post-Soviet Russia.

secure loyalty from top-ranking figures in a short-term perspective, by instigating power struggles among them. But the ruling strategy, neglecting legally-formal and impersonal mechanisms, increasingly made individual bureaucrats vulnerable to private interests and aggravated factional conflicts within the state bureaucracy, by unrestrainedly blurring a stable career prospect for both seniors and juniors.

Although the Federal Law on the Base of State Service of the Russian Federation, which defined the formal requirement for occupying official posts and the standards for career advancement, was adopted in July 1995, bureaucratic discipline in the Weberian sense could not be established (Brym and Gimpelson 2004). Additionally, low salaries could also not give a strong incentive to state officials to work hard (*Izvestiya* 5 February 1996: 2). On the other hand, President Putin could exploit the state bureaucracy more effectively than his predecessor, by controlling federal law enforcement agencies to obey his orders more thoroughly, in line with the 'consolidation of vertical power' (Shevtsova 2005: 233-234; Yakovlev 2006: 1041-1048). However, even the organisational hierarchy was not dependent on bureaucratic mechanisms, but on coercive discipline and punishment. In Russia, individual bureaucrats are still not only politicised in favour of any private network or local governor's faction through patron-client ties, but are also susceptible to corruption under the non-bureaucratic and fragmented organisational hierarchy. At the same time, the state bureaucracy cannot so efficiently work to serve an incumbent president's partisan goals, let alone their ordinary tasks – unlike in South Korea – although the president may exploit them to some extent, relying on his broad constitutional appointment power.

Most importantly, the Russian Prosecution Service could also not be effectively used by a current president, due to the half-faced organisational hierarchy from the post-totalitarian legacy. Although the prosecution service would generally show loyalty to the president, several factions within this power apparatus would not only be in conflict with each other, but also sometimes collude with other political or business forces than his clique, unlike a traditional civil-law prosecution services. For example, the old enmity between the Federal and the Moscow City Prosecutor's Offices was well known, and furthermore, the latter occasionally swung between President Yel'tsin and the Mayor of Moscow Yurii Luzhkov (*Izvestiya* 31 July 2003; *Kommersant* 14 January 2000). Then, an irony is that this half-faced organisational hierarchy could prevent a Russian President from effectively misusing prosecutors in achieving his partisan goals, which is somewhat different from South Korea in which even low-ranking prosecutors are unconsciously induced to take a unified partisan

behaviour in favour of an incumbent president under the solid organisational hierarchy. In practice, Yel'tsin could not so successfully exploit the prosecution service in some cases (Kostikov 1997: 115-116).

Nonetheless, this does not mean that a particular faction within the prosecution service can easily challenge an incumbent president and bring criminal proceedings against his faction. As long as a Russian President holds the ultimate authority to promote prosecutors to a top-ranking post, he can also enjoy priority in abusing the enormous power of the civil-law prosecution service, in order to destroy his political oppositions, over any other political actors (Yasin 2012: 384). The president's advantage is likely to continue at least until the last phase of his tenure. In particular, President Putin's hierarchical domination over the prosecution service became much stronger, than in his predecessor's terms, along with his 'consolidation of vertical power' enforcing the legislature, regional governments, and even the oligarchs to bow to the authority of the Kremlin (Lee 2010: 266-267). In other words, such interaction between prosecutors and an incumbent president did not change until the large-scale reform of the Russian Prosecution Service in June 2007. The below section examines the political interaction through some empirical cases during President Yel'tsin's and Putin's periods.

5. 2. Presidents' abuse of the prosecution service and the politicisation of criminal justice in Russia after democratisation

5. 2. 1. Political conflicts and polarisation in newly democratised Russia

In Russia, as touched on in the previous section, severe domestic political conflict began to appear around the 'August 1991 *coup*' from the most reactionary pro-Soviet faction in the CPSU. In fact, the centrist, reformist, and even communist groups within the Russia's CPD had cooperated with each other, by the time when Gorbachev tried to reform the Union of Soviet Socialist Republics (USSR) without its dissolution (Remington, Smith, Kiewiet and Haspel 1994: 163-170). This is why the majority of domestic political forces could somehow unite behind the Yel'tsin-led Democratic Russia until gaining the independence of the Russian Federation in December 1991. However, the political conflicts right after the collapse of totalitarian regime and abandonment of communist system could never be small scale. By its nature, the transformation of this type of regime was somewhat different

from a mere democratic transition of an authoritarian regime (Bunce 1995; Offe 1991). While the conflicts among political ideologies or economic interests could not help but be relatively more violent, the controversy over economic reforms, from the centrally planned economy to the capitalist one, became very serious. In Russia, even the debate over the constitutional design for an appropriate distribution of political authority was regarded as a by-product of the conflict over economic change, unlike in South Korea.

Until late 1991, Yel'tsin enjoyed a high level of popularity, albeit with little constitutional power, since he not only won the Russian Presidency by a wide margin in June, but also overcame the *coup* by the most reactionary pro-Soviet force. In this context, the CPD was likely to grant the president a comprehensive decree-making power to carry out radical economic reform, even though it was only a temporary right. Energised by his then high public and legislative supports, the president could dare begin transforming a confused Russia's political and economic circumstances (Moser 2001: 78). To begin with, Yel'tsin established the Russian sovereignty by dissolving the Soviet Union, together with the leaders of Belarus and Ukraine. Moreover, he decisively seized control of enterprises and even banned the CPSU from Russian territory. These were not difficult tasks for Yel'tsin, because he had received a broad support from most political forces, as well as enjoying a consolidated position in Russia, given that the communist hard-liners' *coup* had already been defeated. Before long, however, the pro-communists turned against Yel'tsin and even the centrists joined the new conservative bloc, because his radical initiatives increasingly encroach on their own grounds. Eventually, Yel'tsin's reformist camp and Khasbulatov's conservative bloc began to crash violently, around the controversy over whether a radical or gradual economic reform should be chosen to transform Russia successfully.

As mentioned above, President Yel'tsin pushed for the radical economic reform, together with Deputy Prime Minister Gaidar. At that point, he strongly believed that an 'irreversible reform' was required for a successful transformation, according to his memoir (Yel'tsin 1994: 145-147). But the revolutionary reform of Gaidar's team, backed by presidential decrees, immediately encountered a vehement opposition from both the population and the parliament. Given the immoderate financial expansion of the late USSR era, and economic disorder from sudden separation of the single Soviet 'ruble zone,' which had brought an extreme stagflation, the decision of Gaidar's cabinet to set prices free and cut government subsidies was bound to cause nationwide discontent in early 1992. Although the expected effects could not be avoided for solving the shortage of consumer goods, the sharp price

increase made many daily necessities too expensive for the majority of the populace. As the stabilisation policy was also taken, moreover, the country suffered from massive inter-enterprise non-payment dilemma (Herrera 2001: 142-144).

In this phase of revolutionary change, the centrist forces, composed of industrialists from the old communist party, increasingly disagreed with the radical idea of Gaidar and his cabinet. In fact, any political or social force to challenge the organisational power of the industrial managers had not yet emerged after the collapse of the USSR (McFaul 1995: 220). Then, this influential group claimed state subsidies, and strongly objected to market liberalisation, macro-stabilisation, and drastic privatisation (Hanson and Teague 1992). In particular, they made a coalition with other political forces and even labour unions, under the banner of the growing centrist bloc in the CPD, Civic Union. This coalition which could impose a threat to Yel'tsin and his reform-minded executive leadership eventually brought an irrevocable political polarisation in the post-Soviet politics in Russia, by joining the conservative pro-communist opposition in April 1992 (Huskey 1999: 29). Accordingly, President Yel'tsin could not help attracting the centrist forces in part, in order to sustain his political authority. His decisions to keep distance from Gaidar's liberal cabinet and gather a support from the industrialists led to his appointment of Viktor Chernomyrdin, Vladimir Lobov, Vladimir Shumeiko and so forth, who had a long career as industrial manager, to top-ranking posts of the executive branch (Reddaway and Glinski 2001: 337).¹⁶

Nonetheless, the political polarisation could never be alleviated. Vice-President Rutskoi, and one of the leaders of the Russian Union of Industrialists and Entrepreneurs (RUIE), Arkadii Vol'skii, also deserted Yel'tsin, and the clash between the president and legislature became increasingly serious. Even though a referendum was held to decide which branch should be the dominant one between the presidency and the parliament, and its outcome showed greater support for the former in April 1993, the latter still adhered to its own stance (Brown 1993: 189; Murrell 1997: 153-155). In October 1993, after all, President Yel'tsin coercively emasculated the Supreme Soviet and consequently could obtain the superpresidency, while the constitutional crisis was brought on, as described in the above section. However, fundamental causes of the political polarisation did not be removed, although the president became to be able to use his far-reaching presidential power for

¹⁶ These appointments for the 'divide and rule' might be an attractive strategy for Yel'tsin to cope with his authority crisis, but they actually undermined the cohesiveness of his economic policies. As explained previously, in particular, this erratic strategy aggravated the fragmentation and factional conflicts within the state bureaucracy, together with his frequent reshuffle of the cabinet, based less on bureaucratic criteria than on the candidates' temporary loyalty for the president himself.

resolving the political conflicts unilaterally – albeit only temporarily – every time, after the enactment of the new constitution in December 1993. As repeatedly mentioned, a strong presidency itself tends to result in a violent conflict among political actors, because of the characteristic of ‘winner takes all.’ In Russia, therefore, the factors of serious political competition have often brought a political polarisation and conflicts, intertwined with the presidency.

Moreover, President Yel'tsin was reluctant even to create any ‘party of power,’ but wished to govern the state as a ‘patriarch’ (Breslauer 1999; Linz and Stepan 1996: 394). What is worse, the legislature returned with an anti-presidential majority in the 1993 Duma election. Specifically, the liberal and centrist parties, such as Russia’s Choice or Civic Union, made a poor performance, whereas the nationalists’ Liberal Democratic Party of Russia (LDPR) unusually brought a notable advance. Most significantly, pro-communist forces were *de facto* resurrected in the form of the Communist Party of the Russian Federation (KPRF). In this situation, President Yel'tsin was unable to overcome the temptation of *decretismo* in critical policy-making processes, and consequently political conflicts could not help being intensified. Meanwhile, the president selectively supported some commercial bankers via debatable policies, for example, the ‘loan for shares’ or the issuance of short-term bonds (GKO), and correspondingly they could quickly arise as the powerful oligarchs with a huge influence and wealth (Hough 2001: 207-219).¹⁷ That is, President Yel'tsin decisively formed a coalition with the oligarchs, which eventually structured the political polarisation between the pro-Yel'tsin and conservative forces, including the KPRF. In practice, Yel'tsin could win the presidency once again in the 1996 election, because the oligarchs strongly supported him, in the circumstance that there were no other alternative for them (McFaul 1996). In Russia, this structure of polarised politics continued until President Putin created an electoral authoritarian regime at the beginning of his second term.

In short, the extreme political competition had been constructed as a constant, in Russia after democratisation, until Putin’s second term. In addition, the probability that a current president and his close allies or family members are involved in corruption would be higher, because of the enormously strong power of the presidency, than ever (Fish 2000: 189). In Russia after democratisation, therefore, both ruling (presidential) and opposition forces would be tempted to abuse the civil-law prosecutors’ extensive power over criminal

¹⁷ For more elaborate explanations about the oligarchs, see Freeland (2000); Goldman (2003); Hoffman (2002) and so on.

procedure, in order to undermine their political enemies. However, a real problem is that an incumbent president can enjoy an absolute priority both in politicising criminal justice against his political rivals and in protecting himself, relying on the prosecution service, during most of his tenure. The next subsection examines the alliance or separation between an incumbent president and civil-law prosecutors, along with presidential electoral cycles, through an analysis of the empirical cases during President Yel'tsin's and Putin's periods.

5. 2. 2. The cases in President Yel'tsin's period

Until the dissolution of the USSR and the beginning of the violent quarrel over economic reform, as discussed above, the majority of domestic political forces had supported Yel'tsin, and a serious political conflict had not yet occurred, in Russian politics. Nonetheless, the pro-Soviet *coup* in August 1991 could also be understood as a political conflict, which made the Russian Prosecution Service bring criminal proceedings in a partisan manner for the first time. The Prosecution Service of Russian Republic, led by Valentin Stepankov, the chief of Russian Republic Prosecutor's Office (the previous title of Prosecutor General of the Russian Federation), immediately took the stance that it should autonomously institute criminal proceedings against the leaders of the *coup*, refusing to hand over materials on them to its equivalent of the USSR (*Izvestiya* 24 August 1991: 1). In addition, Stepankov decidedly banned any tendency of political separatism from Russian Federation. That is, the Russian Prosecution Service *de facto* played a partisan behaviour in favour of the independence of Russian Republic, which most domestic political forces were supporting together. Thus, President Yel'tsin could arrest and jail the political opponents, even though evidence of their criminal act was insufficient (Ahdieh 1997: 41-42). This would have been impossible without the civil-law prosecutors' extensive power over criminal procedure.

Before the enactment of the 1993 Constitution, however, the Russian Presidency could not hold the exclusive control over prosecutors' career, because they still had to be officially accountable to the Supreme Soviet, according to the 1978 Constitution of the RSFSR. It was natural that the prosecution service was on the side of the legislative branch, when Russian domestic political forces split into the two blocs – of the conservative parliament and reformist president – and the conflict between them headed towards the constitutional crisis. Specifically, prosecutors investigated or indicted some of Yel'tsin's close allies, for instance, the Minister of Defence Pavel Grachev, the First Deputy Prime Minister Vladimir Shumeiko, the Chief of Federal Information Centre Mikhail Poltoranin, and State Secretary

Gennadii Burbulis (Filatov 1995: 169-171; *Rossiiskaya Gazeta* 23 April 1993).¹⁸ However, as Yel'tsin achieved a triumph in the conflict between the two democratic bodies and the superpresidency was introduced along with the enactment of the 1993 Constitution, the control over the prosecutors' careers was also actually transferred to the president. Since then, President Yel'tsin could enjoy an absolute priority in politicising criminal justice, through the civil-law prosecution service, during most of his tenure, in accordance with Hypothesis I-1.

Immediately after Yel'tsin's hard-earned victory in the constitutional crisis in October 1993, he could dismiss Prosecutor General Stepankov and eventually select his own chief of the prosecution service, Alexei Kazannik. As stated previously, he had long worked as a law professor in the Omsk University, and correspondingly accrued no prior experience in the prosecution service. Although Kazannik did not possess the career capital required to take the position of prosecutor general, such as seniority and professional performance, at least his loyalty for Yel'tsin was undoubted. In 1989, Yel'tsin could not have gained membership of the Russian Supreme Soviet, if then Kazannik would not have voluntarily relinquished his seat (Colton 2008: 282). Hence, the post of prosecutor general Kazannik gained could not help but be widely understood as the political reward for his old favour. At any rate, Kazannik was unquestionably one of the best options for Yel'tsin, who needed a loyalist helping him to seize control of this power apparatus.

However, an interesting point is that the Prosecutor General Kazannik's decision in a conflict between the president and the legislature under the new constitution was quite different from the expectations on him. In December 1993, the State Duma was once again occupied by an anti-Yel'tsin majority, although the presidential power was enormously strengthened. Sure enough, in early 1994, the State Duma resolutely granted amnesty to the conspirators of the 'August *coup*' as well as the organisers of the opposition forces, such as Khasbulatov and Rutskoi, in the 1993 constitutional crisis. Outraged by the unpleasant release of his political enemies, Yel'tsin directly ordered Prosecutor General Kazannik to block their release by all means. However, Kazannik confirmed, "The Prosecutor's Offices have no right to interpret legal acts of the legislature but must carry them out" (*Izvestiya* 1 March 1994: 2). While the Federal Council rejected to approve the prosecutor general's resignation, President Yel'tsin dismissed him in the end, and elevated a young prosecutor,

¹⁸ As these criminal proceedings brought by the prosecution service were relevant to Yel'tsin's attempt to reform against this power agency, this will be mentioned once again in Chapter VI.

Alexei Ilyushenko, to the highest post.

At a glance, this case could be seen as an inexplicable example against my framework. Kostikov (1997: 290-292) also perceives that prosecutors protested against Yel'tsin, since he failed in his exhaustive control over this power agency. However, Kazannik's choice could not readily be understood, considering his old friendship with Yel'tsin. Rather, it would be more acceptable to conclude that even the Russian prosecutors, who exercised far-reaching power, could never technically carry out an order from Yel'tsin, and therefore the prosecutor general had no choice but to disobey his will in order to defend the prestige of his own organisation, than to understand that they strategically chose political defection against Yel'tsin or firmly kept political neutrality. Moreover, this case could paradoxically indicate how routinely Yel'tsin and his faction attempted to use the civil-law prosecution service in politicising criminal justice against their political opponents. Thus, this case of the president's failure could not necessarily be regarded as a counterexample to Hypothesis I-1 of this thesis.¹⁹

On the other hand, interestingly, President Yel'tsin quite often politicise criminal justice against several broadcasts and newspapers, relying on the prosecution service under the Acting Prosecutor General Ilyushenko. In fact, it was a "wise" strategy for Yel'tsin, who had to prepare for the forthcoming presidential election in 1996, to seize control of the press. Then, Ilyushenko could be identified by Yel'tsin as one of the best candidates for new prosecutor general, who would lead the prosecution service with a partisan manner, because he had led the criminal investigation of Vice-President Rutskoi as the chief of the Interdepartmental Commission of Combating Corruption. But the process of Ilyushenko's appointment did not go smoothly. The Federal Council rejected the nomination twice on the charge of his political bias (*Segodnya* 26 April 1994²⁰). Nonetheless, Yel'tsin pushed ahead with Ilyushenko, even appointing him to acting prosecutor general, for exploiting the power agency. Predictably, Acting Prosecutor General Ilyushenko coercively oppressed the domestic media that were critical of the incumbent president (Smith 2007: 5).

¹⁹ In reality, Kazannik, after his resignation, confessed that he had also not liked the amnesty but his decision had been inevitable according to the constitution, and even testified that Yel'tsin's loyal aides had then believed, "We can do anything," regardless of law. On the other hand, Kazannik stressed that he had done his best to be an impartial prosecutor general in the interviews with the press (*Los Angeles Times* 14 May 1994; *Moskovskie Novosti* 30 September 2003), though such self-assessments were small wonder for him but still debatable. The case of Kazannik will be dealt with again in Chapter VI.

²⁰ This press news was translated by the *Current Digest of the Russian Press* vol. 46, no. 17 (1994): 14-15.

For instance, first of all, *Moskovskii Komsomolets*, the highest circulation newspaper in Moscow, was targeted by the prosecution service under Ilyushenko. In the constitutional crisis in 1993, this newspaper criticised the conservative legislature force but supported President Yel'tsin and his reformists' bloc (*The Independent* 10 November 1993). However, the relation between the newspaper and president could not help but become a tinderbox, since Dmitrii Kholodov, an investigative journalist of this newspaper who was writing articles on the large-scale corruption of high-ranking military officers – including the Minister of Defence Grachev – was killed in suspicious circumstance in October 1994. Grachev even sued the editor of the newspaper, strongly denying his involvement in the corruption, let alone the murder (*Segodnya* 22 October 1994: 1). Yel'tsin also defended him throughout this scandal, though he dismissed the Deputy Minister of Defence Matvei Burlakov. Above all, Acting Prosecutor General Ilyushenko announced that Grachev had never been involved in these scandals (Desch 1999: 59). Nobody knows whether or not Grachev actually had a connection with the military corruption or murder case. However, the prosecution service seldom attempted a thorough investigation into these cases during Yel'tsin's tenure, though the Federal Counterintelligence Service (FSK: the previous title of the FSB) had already submitted a detailed report on the prime suspects to the president (Holmes 1999: 78; *Izvestiya* 6 January 1995: 1). Instead, in November 1994, the Acting Prosecutor General Ilyushenko repressed *Moskovskii Komsomolets* on the charge of its 'outright rudeness' with perfect timing, and the newspaper finally reversed its stance to advocating Yel'tsin, also in the 1996 presidential election.

In June 1995, moreover, the prosecution service initiated criminal proceedings against the NTV's puppet show *Kukly* for damaging portrayal of Chernomyrdin and Yel'tsin (Smith 2007: 5). While there were various reasons for one of the oligarchs, Vladimir Gusinskii, and his major broadcast NTV that had been so critical of the Chechen War, to turn pro-Yel'tsin in the 1996 presidential election,²¹ the prosecutors' aggressive attitude must have also been a vital factor for his conversion. Since the leader of opposing press, NTV, joined Yel'tsin's election campaign, the criticism of him and the war naturally ceased (Koltsova 2000: 45). Therefore, in accordance with Hypothesis I-1, Ilyushenko could be understood to demonstrate his loyalty to the current president and consequently to maintain the 'acting' position as many as 19 months.

²¹ For example, it is well known that Gazprom invested in Media-Most (the holding company of NTV) in exchange for NTV's strong support to Yel'tsin in the 1996 presidential election. Moreover, one of main reasons was removed for NTV to go against Yel'tsin, because he stopped the military action against Chechen in April 1996. Most of all, Gusinsky, as one of the oligarchs, could not help the KPRF instead of Yel'tsin.

On the other hand, one of Yel'tsin's old political rivals, the Governor of Kursk Rutskoi could also not avoid the repression by prosecutors in June 1998 (*Kommersant* 17 June 1998). Rutskoi's two closest allies, the First Vice-Governor Yurii Kononchuk and Vice-Governor Vladimir Bunchuk were arrested at the same time, on the account of corruption scandal, by the prosecution service. Rutskoi furiously denounced his long-time opponent, the Chief of Kursk Prosecutor's Office Nikolai Tkachyov, as manipulating the criminal proceedings in order to injure his image in the regional politics. According to an expert in the regional politics, Nikolai Petrov, the arrests were part of a large-scale campaign by the Federal Prosecutor's Office, although they might have actually been involved in some corrupt businesses (*The Moscow Times* 17 June 1998). Thus, there was a high possibility that these criminal proceedings had also been initiated by the prosecutors under President Yel'tsin's direction. Expectedly, Rutskoi immediately flew to Moscow in order to recover his relationship with the president. He even claimed that the constitutional court should allow Yel'tsin to stand for reelection in 2000, but nothing was changed (*The Moscow Times* 20 June 1998). It is certain that Yel'tsin eventually got revenge on his old political rival, who had gone against him amid the 1993 constitutional crisis, through the politicisation of criminal justice.²²

In Yel'tsin's period, however, the Russian Prosecution Service seldom brought a criminal proceeding against major opposition politicians, for instance, Gennadii Zyuganov (the leader of the KPRF), in spite of its arbitrary power over criminal procedure. This could be because prosecutors were not only corrupted but also ineffectively performed under the half-faced organisational hierarchy.²³ Therefore, they could not so successfully work even for the incumbent president – exercising ultimate control over their careers –, which unintentionally made the power apparatus more politically neutral than in South Korea. Nonetheless, the prosecutors were not only often involved in the judicialisation of politics, by initiating criminal proceedings against the critical press against Yel'tsin, but also gave immunity to the corruption involving his close allies, by not bringing criminal proceedings

²² Similarly to Rutskoi, the former Mayor of St. Petersburg Anatolii Sobchak was also seriously investigated by the prosecution service in 1996, after he had fallen with President Yel'tsin (Jack 2004: 84; Treisman 2011: 89), although Yel'tsin (2001: 232-234) testified that Prosecutor General Skuratov had instituted criminal proceedings against Sobchak out of his control in his memoir.

²³ In particular, many regional governments were penetrated by the KPRF in the Yel'tsin era (Stoner-Weiss 2001: 124). Moreover, prosecutors were unlikely to make a serious trouble with the KPRF, which constantly pursued the restoration of the previous Soviet tradition including the great power and high status of the prosecution service, although they were undoubtedly aggressive against Yel'tsin's other political opponents, according to Professor Bill Bowring in an interview with me (2 December 2013). This issue will be discussed again in Chapter VI.

against them until the last year of his second term. However, as Prosecutor General Yurii Skuratov launched a criminal investigation of the corruption of Yel'tsin and his 'family,' the prosecution service began to betray the incumbent president at the beginning of 1999.

As is well known, Yurii Skuratov had spent most of his long career as a law professor in Yekaterinburg. Yet, because of his private tie with Yel'tsin, he got appointed to the head of the Research Institute of the Problems of Strengthening Law and Order in the Federal Prosecutor's Office in 1993, and eventually promoted to the prosecutor general in October 1995. Therefore, the new prosecutor general was also expected to go in favour of President Yel'tsin, like Ilyushenko. In practice, Skuratov served the president's interests until the last part of his tenure. For example, the prosecution service launched no meaningful criminal investigation into Yel'tsin and his inner-circle members, concerning not only the murder cases of two influential journalists, Vladislav List'ev and Dmitrii Kholodov, but also the political scandal involving the 1996 presidential election campaign²⁴ (Holmes 1999; 78; Satter 1996; Wishnevsky 2006: 185). Nonetheless, Prosecutor General Skuratov began to open fire on President Yel'tsin and his faction, in early 1999 when his presidential tenure came to an end, in accordance with Hypothesis I-1 of this thesis. This affair started as the Federal Prosecutor's Office launched a criminal investigation into the corruptions of high-ranking state officials, who had lobbied for a Swiss construction company, Mabetex, and of Boris Berezovskii, a powerful oligarch whose connection to the Kremlin was strong (Satter 2003: 56-57). And eventually, the investigation of the Federal Prosecutor's Office reached the incumbent president and his daughters, Elena Okulova and Tatiana D'yachenko. On the other side, President Yel'tsin responded with a request for the Federal Council to relieve Skuratov of his heavy obligation. Although the president justified the resignation of the prosecutor general on the plea of his ill health, there was a suspicion that Skuratov might be dismissed because of his conflict with the Kremlin (*Segodnya* 3 February 1999).²⁵

²⁴ According to the transcript of a taped meeting published by the *Moskovskii Komsomolets*, the Deputy Prime Minister Anatolii Chubais who was deeply involved in the 1996 presidential election campaign actually pressured Skuratov to cover up this scandal quietly. In particular, the transcript contained Chubais's testimony that Skuratov was a politically pliable person (*The New York Times* 16 November 1996).

²⁵ It could be debatable whether Skuratov had "actually" already planned the criminal investigation into Mabetex before the overt conflict between him and the Kremlin in February 1999. In particular, Yel'tsin (2001: 224-226) revealed that Skuratov had suggested a "deal" to him through the Mabetex affair in order to secure the position of prosecutor general. However, Yel'tsin's explanation in which Skuratov began the investigation against the Kremlin in order to enforce the president to withdraw the decision on his dismissal is not so persuadable, because the prosecutor general could have continuously maintained the alliance with Yel'tsin by not opening the criminal cases involving some members of the Kremlin 'family' such as Berezovskii. Skuratov (2012: 49-52) also testified that the Kremlin had initially threatened him, through the fake 'sex vide,' by reason of his criminal investigations into Berezovskii and Mabetex in his retrospect. Also considering Primakov's and Luzhkov's strong support for Skuratov and his running for the 2000 presidential election, he could be analysed as having initiated the criminal proceedings against the president by other

Meanwhile, Yel'tsin could take a chance to overcome the crisis, as an amazing video that showed a naked man, "resembling" Skuratov, in a sauna with two young women, was aired on the state-run television, RTR, on 17 March. Accordingly, the presidential decree to relieve Skuratov of his post of the prosecutor general was ordered on the basis of Article 42 and 54 of the Federal Law on the Prosecutor's Office (*Rossiiskaya Gazeta* 3 April 1999). However, even the problematic video could not help President Yel'tsin to dismiss Skuratov officially. Although the president "worked on" the senators, the Federal Council rejected to confirm the resignation of Skuratov in order to put a pressure on him (*Izvestiya* 22 April 1999). Therefore, if prosecutors behaved as a unitary actor as in South Korea, the then conflict between the prosecution service and the president could not have ceased, and someone among the president's closest members would have been indicted, in spite of the sensational scandal of Skuratov.

However, President Yel'tsin could narrowly escape the worst circumstance even in the last phase of his second term, by controlling the top-ranking prosecutors' career and exploiting factional conflicts within the prosecution service. In Russia, as discussed above, the career promotion system is comparatively less based on procedural and impersonal mechanisms, because of which President Yel'tsin could delay the moment when top-ranking prosecutors would strategically betray him as late as possible. For example, Skuratov's two deputies, Yurii Chaika and Vladimir Ustinov, are known to have deserted Skuratov but supported Yel'tsin in the clash between the two, and unsurprisingly, both could get promoted, in turn, to the position of prosecutor general – albeit acting one – within Yel'tsin's short remaining tenure (*The Moscow Times* 10 August 1999).²⁶ Furthermore, Sergei Gerasimov, the chief of Moscow Prosecutor's Office, who had refused to institute criminal proceedings against Skuratov due to his political connection with the Mayor of Moscow Luzhkov, also joined the Kremlin in return for his career advancement to a higher post, the head of a research institute of the Federal Prosecutor's Office (*Kommersant* 14 January 2000).

Finally, the criminal investigations by the prosecution service were suspended, although

political plans in preparation for the post-Yel'tsin era.

²⁶ However, Ustinov and Chaika might have also eventually betrayed Yel'tsin immediately before his resignation, unless Putin had become the most likely candidate for the next presidency. That is, their defection could be suspended, not only because Yel'tsin *de facto* named Putin as his successor, but also because Putin's party (Unity) could achieve an unexpectedly good result in the 1999 State Duma election. In particular, the fact that Ustinov and Chaika helped Putin when he played a critical role as the chief of the FSB in revealing the 'sex video' involving Skuratov (Taylor 2011: 61), can strongly advocate this assumption.

Skuratov officially lost his post only after Putin's presidential inauguration (*Los Angeles Times* 20 April 2000). Consistent with Hypothesis I-1 of this thesis, the case of Skuratov confirmed that civil-law prosecutors would defect against an incumbent president in the last phase of his tenure,²⁷ while indicating that a post-totalitarian prosecution service could not so effectively betray him even in his last moment, and hence it could unintentionally maintain political neutrality rather than a post-authoritarian one, such as the South Korean Prosecution Service.

5. 2. 3. The cases in President Putin's period

Since President Yel'tsin abruptly resigned while appointing Prime Minister Putin to acting president at the end of 1999, the latter had to command Unity, the improvised ruling party which would fight the 1999 State Duma election, and run for the 2000 presidential election as well. However, at first, neither Unity nor Putin seemed to have much chance of obtaining high public support in the two imminent national elections, owing to the deep disillusionment with the current president (Petrov and Makarkin 1999: 121-124). Instead, the Fatherland-all Russia (OVR), another 'party of power' headed by the former Prime Minister Yevgenii Primakov, was predicted to bring better performance in the elections. Nonetheless, as the Second Chechen War gained public support, especially because of the Dagestan Massacre committed by the Chechen warlord Salautdin Temirbulatov in 1999, unlike the first war, Putin could take a political opportunity to build his image as powerful leader, and therefore his approval rating soared. Moreover, Berezovskii strongly supported Unity and Putin through the mobilisation of his media empire, in particular the ORT (Colton and McFaul 2003: 56). As a result, Putin not only enabled the new 'party of power' to perform quite well in the legislative election in December 1999, but also finally won the Russian Presidency in March 2000.

Meanwhile, prosecutors could also be regarded as contributing to Putin's victory on his turbulent journey to the Russian Presidency. The prosecution service under Prosecutor General Skuratov had attempted to betray Yel'tsin, but eventually recognised Putin as next president. To be certain, as examined previously, most top-ranking prosecutors voluntarily

²⁷ There could be a counterargument that prosecutors will not betray an incumbent president even in the last phase of his tenure, fearing that he may come back as the president after next. In some countries such as Russia, a person can run for the presidency one more after the terms of other presidents, though he already served consecutive terms. Nonetheless, top-ranking prosecutors are likely to keep their distance from the outgoing president, because the possibility of his return is too invisible while their chance to get promoted to a higher rank is significantly visible.

demonstrated their loyalty to Putin, since he was emerging as the strongest candidate for the fast-approaching election, because of the above favourable factors. If the prosecution service fought with Yel'tsin to the bitter end, following Skuratov, Putin could not even have had the chance to obtain the post of acting president. Afterwards, in President Putin's period as well, the Russian Prosecution Service often exercised its massive power in favour of the current president. But the frequency and extent of the politicisation of prosecutors were much more serious, than in the predecessor's terms. President Putin could effectively utilise the prosecution service, in destroying his political enemies or in giving immunity to corruption of his faction, owing to his high popularity, from the beginning of his term. In particular, Putin's domination over the prosecution service could be increasingly tightened, since the Kremlin's vertical power was consolidated.

<Table 5-1> The Prosecutors General in President Yel'tsin's and Putin's Periods

| Name | Service Period | Main Previous Career | Next Position |
|--|---------------------------------|--|--|
| Alexei Kazannik | October 1993 – March 1994 | - Professor, Law Faculty in the University of Omsk | |
| Alexei Iluyshenko (acting position) | March 1994 – October 1995 | - The Chief of the Interdepartmental Commission of Combating Corruption | |
| Yurii Skuratov | October 1995 – February 1999 | - The Head of the Research Institute of the Problems of Strengthening Law and Order in the Federal Prosecutor's Office | - Presidential Candidate (independent) |
| Vladimir Ustinov | March 2000 – June 2006 | - Acting Prosecutor General - Deputy Prosecutor General - The Chief of Krasnodar Krai Prosecutor's Office | - The Minister of Justice - The Presidential Envoy of the Southern Federal District |
| Yurii Chaika | June 2006 – Now | - Acting Prosecutor General - The Minister of Justice - Deputy Prosecutor General | |

For example, Vladimir Gusinskii and his Media-Most, which had been highly critical of Unity and Putin in the two national elections, could not help being first targeted, for President Putin's political revenge, by the prosecution service. As stated above, Gusinskii's NTV was one of the toughest critics of the First Chechen War, but the oligarch had no choice but to help Yel'tsin, for blocking the victory of the KPRF, in the 1996 presidential

election. In the late 1999 and early 2000, however, Gusinskii utterly reversed his stance again. NTV supported the OVR in the 1999 State Duma election and a liberal champion, Grigorii Yavlinskii, in the 2000 presidential election, while violently criticising the Second Chechen War (Colton and McFaul 2003: 216). Thus, it was not surprising that prosecutors initiated criminal proceedings against Gusinskii less than a month after Putin's presidential inauguration. On 11 May 2000, Gusinskii's office was searched by some masked agents, and in next month he was arrested, by the Federal Prosecutor's Office, on the charge of having defrauded a state-owned TV company, Russkoe Video, out of money as much as USD 10 million with the help of its directors (*The Moscow Times* 14 June 2000). The criminal case which had once been terminated in 1998 was reopened by prosecutors at an unreasonable time. Although Putin said that he had not perceived the institution of the criminal proceedings, he inwardly gave a hint that this arrest was just the start, mentioning the Media-Most's unpaid debt to Gazprom. Many people, including a variety of political figures such as Luzhkov and even Gorbachev, were already convicted that the prosecution service initiated criminal proceedings against Gusinskii under Putin's political intention (*The Moscow Times* 15 June 2000). As Gusinskii secretly agreed to sell his media business to Gazprom for repayment of the debt, he could be released from detention.

However, the release was by no means the end of this affair. In September 2000, Gazprom-Media complained that almost all of asset of Media-Most had been withdrawn from Russia in April 2000, which was devaluing the shares of the company as collateral for Gazprom, and subsequently the prosecution service brought criminal proceedings against Gusinskii again. Then, a notable point regarding the politicisation of criminal justice was the timing of the criminal proceedings, given that Gazprom-Media had already filed a suit two weeks previously. The Federal Prosecutor's Office had not initiated the criminal proceedings, but did them right at the moment when a lawyer of Media-Most revealed that there had been a secret agreement between Media-Most and Gazprom under the pressure of government in June (*Kommersant* 29 September 2000: 3). This exact timing of the prosecutors' initiative verified that they were arbitrarily exercising their enormously wide power for the current president. In addition, according to Deputy Prosecutor General Vasilii Kolmogorov, on the one hand, investigators collected so much evidence that Gusinskii withdrew the company's assets out of Russia, but, on the other hand, they were convicted that he had received too much loan in security for his company, which was nearly bankrupted in 1999, by deceiving the creditors. However, if the shares had already been worthless from 1999, his withdrawal of asset was not a problem. Nonetheless, the Federal Prosecutor's Office did not account

for how these essentially contradictory charges could be brought at the same time (*Vremya Novostei* 2 November 2000). Such distortion of criminal proceedings would not have been possible without the prosecutors' arbitrary power over criminal procedure. Later, Media-Most was searched as many as 35 times, and its ownership was ultimately transferred to Gazprom (Baker and Galsser 2005: 82-83). Gusinskii, who attempted to avoid indictment, has not yet been able to come back to Russia, moving from one country to another with his dual Israeli and Spanish citizenship.

Meanwhile, the politicisation of criminal justice against Berezovskii also occurred, which was rather unexpected. As is well known, Berezovskii not only acquired huge wealth in the transitional period, like other oligarchs but even enjoyed a greater political influence and position, as one of Yel'tsin's 'family' members, than the others. In particular, as noted above, he stood by Yel'tsin to the end and even supported Putin to win the presidency via his massive media power, unlike another media magnate, Gusinskii. Hence, it could not easily be expected that he would become a target of the prosecution service under President Putin. However, the situation took a twist, since Berezovskii began making his political dissent against Putin to strengthen his political bargaining power. First of all, Berezovskii publicly announced his plan to create a party of "constructive opposition" against the "authoritarian president," criticising Putin's plan to gain the right to dismiss elected provincial governors (*The Moscow Times* 11 July 2000). A few days later, he even gave up his seat in the State Duma, as a mark of protest against some moves by Putin's government, for example, the criminal cases opened against oligarchs including Gusinskii and Vladimir Potanin, Putin's attempt to dominate provincial leaders, and so on. However, Berezovskii's choices seemed unable to attain popularity, given that there was a high level of distrust towards the oligarch not only in political arena but also in civil society.

Then, the Federal Prosecutor's Office summoned Berezovskii as a witness in the Aeroflot misappropriation case, though he had been cleared of the relevant charges in 1999. Hence, it was widely suspected that Putin's anti-oligarch campaign would reach him at last, and the criminal proceedings might be initiated again (*The Moscow Times* 18 July 2000). In September, it became apparent that President Putin was targeting Berezovskii, since the oligarch revealed that the Chief of the Presidential Administration Alexander Voloshin had said that he might be arrested unless he would abandon his shares in the ORT. However, Berezovskii did not surrender but announced that he had a plan to transfer his stake in the national broadcasting to some prominent intellectuals and journalists (*The Russia Journal*

9 September 2000). As expected, he was summoned to appear at the Federal Prosecutor's Office to be investigated and possibly indicted for the suspected diversion of about USD 1 billion from Aeroflot. The criminal case, which had already been terminated in 1999, was preposterously reopened by the prosecution service under President Putin (*The Moscow Times* 15 November 2000). Even though the close of the criminal case in 1999 might have been fabricated by prosecutors, this reopening of the case once again confirmed that their extensive power over criminal procedure could always be misused as an effective political weapon for incumbent presidents in Russia. Berezovskii finally sold his 49% of stake in the ORT to another oligarch, Roman Abramovich, who had strong ties with the Kremlin, but refused to comeback to Russia and stayed in the U.K. in order to escape arrest by the prosecution service under Putin. He was never to come back to Russia, like Gusinskii.

As the above two cases indicate, Putin completely destroyed his two political enemies, through the civil-law prosecutors' massive power, less than a year after becoming president. Because of the deep public antagonism towards the oligarchs, the politicisation of criminal justice could more easily be accomplished. In particular, the criminal proceedings against Gusinskii and Berezovskii could be advantageous for Putin as a new president, also in seizing control of increasingly growing private media power in Russia (Rutland 2005: 171). As explained below, the top-ranking prosecutors who managed these criminal cases could get advanced to a higher position of the Federal Prosecutor's Office or gain the other high-ranking state post within Putin's two terms, although the criminal proceedings were not reasonably completed but the criminal suspects just lost all of their political influences. Especially, Deputy Prosecutor General Vasilii Kolmogorov, who actually led these criminal proceedings, leaking details of the criminal cases to the press, received the candidacy for the Presidency of Sakha Republic from the Kremlin.²⁸

Mikhail Khodorkovskii's case should also be examined here, because of the critical role of the prosecution service in this case (Tompson 2005: 197), though not in detail, since many academic and journalistic researches have already investigated this affair. Certainly, there were several reasons why Khodorkovskii was targeted by prosecutors under Putin. To begin with, his oil giant, Yukos, decided to build a private pipeline competing with the pipeline monopolised by a state-owned company, Transneft, while justifying the decision

²⁸ However, Putin eventually replaced his candidate with Vyacheslav Shtyrov, the owner of Alrosa (a diamond giant), just before the provincial election, in order to place the big business under his own control (*The Moscow Times* 21 December 2001). Nonetheless, Kolmogorov could sustain his top-ranking post in the Federal Prosecutor's Office at least by the end of Putin's first term.

on the ground of inefficiency of the public pipeline system. Moreover, Khodorkovskii had a plan to sell the majority of his shares in the oil giant to Exxon Mobile, which was in contradiction to Putin's policy line for the nationalisation of energy industries. Above all, this ambitious oligarch seemed to dream of seizing a strong political influence as well. Khodorkovskii not only gave donations to some NGOs, but also bought off more than 100 legislators in the State Duma. Even members of the KPRF were included in his list (Å slund 2007: 237; Jack 2004: 211). These reasons were sufficient for Putin to attempt to destroy him. Inevitably, in October 2003, Khodorkovskii was arrested by officers of the FSB at Novosibirsk Airport, although the Federal Prosecutor's Office had perceived that he was on a well-publicised tour around regions. It was difficult to overlook the prosecutors' timing, considering that this opening of the criminal proceeding was instituted only two months earlier than the 2003 State Duma election.

The prosecution service immediately indicted Khodorkovskii on the charges of tax fraud and evasion. But, in April 2003, the Federal Prosecutor's Office had already instructed tax authorities to execute tax laws scrupulously, because of which the tax arrears of Yukos could eventually be disclosed (Fortescue 2006: 159). Moreover, he was exceptionally held without bail, though the white-collar crime seldom entails pre-trial imprisonment in Russia. Above all, the fact that Khodorkovskii was selectively prosecuted was important (Kvurt 2007). Abramovich enjoyed a similar style of the tax evasion, more actively, in the region he was ruling, Chukotka, but he was secure from the prosecutors' initiative, owing to his strong connection to the Kremlin (Å slund 2007: 238). As Tompson (2005: 192) argued, "Charges of tax evasion could have been brought not only against most businesses but also against most Russian citizens who earned anything more than subsistence wages in the 1990s." There was even no private business which had paid more taxes than Yukos in Russia. Therefore, it was unquestionable that Putin nefariously politicised criminal justice against Khodorkovskii, relying on the prosecutors' enormous power. As a result, he was exiled to Siberia, sentenced to eight years' imprisonment, and his oil giant was completely dissolved to become a state-controlled company.²⁹ By contrast, as predicted, Prosecutor General Vladimir Ustinov and Deputy Prosecutor General Yurii Chaika, controlling these criminal proceedings against Khodorkovskii, could gain their career advancement to the minister of justice and prosecutor general, respectively, within President Putin's tenure.³⁰

²⁹ For more detailed records, testimonies, and assessments about the criminal proceedings of Khodorkovskii, see a white paper of Amsterdam & Peroff (2007). Amsterdam & Peroff is the law firm which took this case.

³⁰ Regarding this case of the politicisation of criminal justice, it seems crucial that Khodorkovskii believed that the Deputy Chief of the Presidential Administration Igor Sechin had commanded all the Kremlin's

In short, President Putin could be also regarded to exploit the civil-law prosecution service against his political enemies by promoting his loyalists to top-ranking positions, under the serious political competition, partly in accordance with Hypothesis I-1. After the beginning of Putin's second term, the empirical cases during his presidential period can no longer be the verification objects of the hypothesis, since the condition of high political competition was removed under Putin's semi-authoritarian regime.

5. 2. 4. An exceptional case: the last phase of President Putin's second term

According to Hypothesis III, if political competition is eliminated, prosecutors would neither betray an incumbent president in the last phase of his tenure, nor make an organisational resistance against his reform, under the institutional combination of a civil-law prosecution system and presidentialism. On the one hand, the political competition, let alone the polarisation, was *de facto* eliminated, when President Putin's second term was beginning in March 2004, in Russia. A sharp economy recovery – dependent on the 'oil money' – bolstered Putin's popularity, and a number of elites from federal power structures, called as *siloviki*, entered into key state positions. Above all, most of the political enemies of the president, in particular oligarchs, were devastated in the later phase of his first term (Kryshtanovskaya and White 2003; Lee 2010; Way 2005). That is to say, President Putin achieved the 'consolidation of vertical power' for a strong state or electoral authoritarian regime.³¹ On the other hand, President Putin could be still regarded as seeking to abuse the civil-law prosecutors' extensive power over criminal procedure, also in his second term, at least a few months before large-scale reform of the prosecution service in June 2007. As explained elaborately in Chapter VI, the famous 'Three Whales (Tri Kita)' scandal revealed in part that Putin had exploited the civil-law prosecution service to instigate the power struggle among some political groups – although they could pursue their own interests only under the control of the president – until later 2006.³²

Then, it cannot be directly verified whether high-ranking prosecutors would strategically

assault on him and his Yukos (*The Moscow Times* 5 August 2005), because Sechin and Prosecutor General Ustinov entered into a matrimonial relation in 2003.

³¹ As the above cases pointed out, prosecutors also played not a small role in establishing the semi-authoritarian regime.

³² Not only the emergence of the electoral authoritarian regime, but also the power struggle among political clans in President Putin's second term, will be more discussed in Chapter VI.

betray President Putin, for their career development, in the last phase of his second term, according to Hypothesis I of this thesis, because political competition had already been eliminated before his tenure came to the end. On the other side, whether the prosecutors would not betray the president owing to the absence of political competition, according to Hypothesis III of this thesis, could also not be directly verified, because the institutional precondition of a civil-law prosecution system was no longer present in Russia at that time. As analysed in Chapter VI, prosecutors lost all of their rights on the stage of a criminal investigation, along with major reform of the prosecution service in June 2007. Thus, the prosecutors might be unable to go against President Putin in his last phase, because they could neither longer initiate nor manipulate criminal proceedings against any politician, including an outgoing president, like their equivalents of other common-law countries.

However, prosecutors were unlikely to betray President Putin in the last phase of his tenure, even if they had retained their vast power over criminal procedure. Two circumstantial pieces of evidence could contribute to indirectly proving that high-ranking prosecutors would not betray the outgoing president. First of all, as the framework of this thesis already proposed, under an electoral authoritarian regime, a current president can even personally choose his successor when his personal power base is consolidated, especially in much high public support for him. Then, civil-law prosecutors would have no incentive to betray the current president, but would consistently show their loyalty to him, for their career development under the next presidency. President Putin was also never predicted to leave the political arena after his retirement, because he could maintain high popularity to the end. Rather, he had been suspected to amend the constitution for his third term, despite his repeated denials (*Izvestiya* 2 February 2007). Otherwise, Putin was at least expected to choose his successor between the two First Deputy Prime Ministers, Dmitrii Medvedev and Sergei Ivanov (*The Moscow Times* 5 June 2007; *Vedomosti* 16 February 2007). In actuality, Medvedev could obtain over 70% of the total votes cast because of Putin's overt assistance in the presidential election in March 2008, although he had only 14% approval in survey of public attitudes towards potential candidates up to December 2007 (*The New York Times* 3 March 2008). In addition, Putin had already publicised that he would take a serious role, after his retirement, also in the next government. Expectedly, in October 2007, Putin accepted an offer to occupy the first spot on the candidate list of the 'party of power,' United Russia, for the upcoming State Duma election in December 2007 (*Nezavisimaya Gazeta* 2 October 2007). Moreover, he declared his willingness to serve as prime minister in the new government, if United Russia would win the legislative election. This unusual

plan was smoothly realised, due to the party's overwhelming success on polling day (*The Moscow News* 5 October 2007; *The Moscow Times* 18 December 2007). In this situation, it is undoubted that the civil-law prosecutors would not defect against the outgoing president.

Most importantly, as the framework of this thesis suggested, the civil-law prosecutors' collective interest to protect their great prerogative is more valuable than their individual interest to get advanced to an upper rank. Even top-ranking prosecutors are likely to join their organisational resistance against an incumbent president who attempts to reduce their prerogatives, sacrificing their career development. This was already verified through some empirical cases of South Korea in Chapter IV. Thus, it is logical to assume that civil-law prosecutors would have no reason to betray an incumbent president in his last phase, unless they make an organisational resistance against the president, even when he launches major reform against them. This is why Hypothesis III of this thesis can indicate that civil-law prosecutors would not choose both the forms of defection against a current president when political competition is absent, as noted in Chapter I. Chapter VI will explain the political dynamic in which prosecutors could not organise to resist President Putin, who pushed for large-scale reform against them, in the absence of political competition. This verification will automatically confirm that the high-ranking prosecutors would not choose strategic defection against Putin in the last phase of his second term, even though the prosecution service had held their far-reaching power over criminal procedure.

5. 3. Summary

On the one hand, this chapter has sought to explain the frequent pattern of the politicisation of criminal justice under the institutional combination of the civil-law prosecution system and presidentialism, via the empirical analysis of some cases during President Yel'tsin's period and Putin's first term in Russia after democratisation. This was to verify Hypothesis I-1 of this thesis: under the institutional combination of a civil-law prosecution system and presidentialism, if political competition is high and an incumbent president seeks to abuse the prosecutors' extensive power, they would manipulate criminal proceedings in favour of him during most of his tenure, but betray him in the last phase of his tenure. On the other hand, this chapter has sought to explain why prosecutors would not betray an incumbent president even in the last phase of his tenure, via the analysis of an empirical case during President Putin's second term, according to Hypothesis of III of this thesis.

As the first institutional precondition in the newly democratised Russia, prosecutors held even broader power over criminal procedure than their equivalents of any other civil-law countries. Hence, the prosecution service could do almost everything arbitrarily, at least in pre-trial criminal proceedings, before the reform of it in 2007. Moreover, the prosecution service has entailed the half-faced organisational hierarchy, which is somewhat weaker than the solid hierarchy of the South Korean Prosecution Service based on bureaucratic mechanisms. As the second institutional precondition, meanwhile, the 1993 Constitution broadly guarantees the presidential power to choose all of his ministers and the chiefs of federal law enforcement agencies *de facto* autonomously from the other branches of government. However, the state bureaucracy including the prosecution service itself could be induced to serve presidents less effectively in Russia than in South Korea, because state officials are not only politicised in favour of any private network or regional governor's faction via patron-client ties, but also susceptible to corruption under the non-bureaucratic and fragmented organisational hierarchy. Due to the combination of these preconditions, an incumbent president could enjoy a priority in abusing the great power of the prosecution service, but this power organ less effectively works for the presidents' orders as well as its ordinary tasks, than the South Korean one.

In Russia after democratisation, on the other hand, the violent political conflict between the presidents' faction and the opposition forces had been constantly brought, until when Putin built electoral authoritarian regime, because some transitional factors for a serious political conflict were combined with the strong presidency. In this situation, corresponding with Hypothesis I-1, President Yel'tsin tried to advance his loyalists to top-ranking posts and exploited the civil-law prosecution service to destroy his political enemies through the politicisation of criminal justice, during most of his tenure, but faced its defection, like the South Korean Presidents. President Putin also often exploited the power apparatus through his loyal top-ranking prosecutors during his first term, but could avoid their betrayal even in the last phase of his second term, because political competition was eliminated in the beginning of his second term. Then, the civil-law prosecutors might have been unable to betray Putin, since they already lost their far-reaching power over criminal procedure in June 2007. However, it is logical to suppose that the prosecutors would not defect against President Putin in the last phase of his tenure, for their career advancement under the next president, in the absence of political competition, even though they had maintained their previous enormous power.

Chapter VI: Presidents' reform of the prosecution service, and the politicisation of criminal justice in Russia

This chapter aims to account for why reform of the prosecution service can succeed in a particular political condition, whereas it can hardly be achieved, under the institutional combination of presidentialism and a civil-law prosecution system, through an empirical analysis of some cases in Russia after democratisation. Indeed, an incumbent president would more often seek his short-term interest in exploiting civil-law prosecutors for the politicisation of criminal justice, than the long-term interest in launching reform against them. Several cases examined in Chapter III and V already showed the utility of the civil-law prosecution service, as a political instrument for an incumbent president. Therefore, though many presidents may have intended to reform the enormous power of a civil-law prosecution service, they have readily abandoned the reform, not daring to go against the power apparatus, but being satisfied with the abuse of it. This is precisely consistent with Hypothesis I-2 of this thesis: if political competition is high and an incumbent president seeks to abuse the civil-law prosecutors' enormous power, any major reform plan against the prosecution service would be suspended. On the other hand, according to Hypothesis II, if political competition is high and an incumbent president willingly pushes ahead with major reform against civil-law prosecutors, they would make an organisational resistance even against him, and hence his reform would fail. In Chapter IV, these two hypotheses were already verified via the empirical analysis of some cases in South Korean President Young-sam Kim (YS)'s and Dae-jung Kim (DJ)'s periods, and President Moo-hyun Roh (MH)'s period, respectively. By contrast, according to Hypothesis III of this thesis, if political competition is eliminated and an incumbent president pursues large-scale reform against prosecutors, they would not make an organisational resistance against him, and therefore his reform would succeed, even under the institutional combination of a civil-law prosecution system and presidentialism. To test Hypothesis I-2 and III, first of all, this chapter empirically explains why no radical reform to adjust the civil-law prosecutors' enormously broad power over criminal procedure was launched, or at best some minor changes of their power bases could be attempted and achieved, during President Boris

Yel'tsin's two terms and Vladimir Putin's first term in Russia. Secondly, this chapter empirically explains why President Putin, among the presidents in South Korea and Russia after democratisation, could exceptionally succeed in the establishment of an 'investigative committee,' and consequently curtail the prosecutors' enormous power in June 2007, in his second term.

6. 1. Insignificant reform of the civil-law prosecution service in Russia after democratisation

6. 1. 1. Major reform attempts but minor changes of the prosecution service during the transitional period

The widespread discourse for reform against prosecutors but minor changes in the Federal Law on the Prosecutor's Office (August 1991 - January 1992)

As mentioned in Chapter V, the political conflict and polarisation immediately after the collapse of the totalitarian regime and the abandonment of a communist system was very severe in Russia, exacerbated by the breakup of the USSR in December 1991. As is well known, in this context, the 'August 1991 *coup*' was provoked from the most reactionary pro-Soviet faction in the CPSU. However, Yel'tsin who had won the presidential election by a wide margin in June 1991 defeated the *coup*, and consequently, Russia managed to begin its long and arduous journey to democracy. Although such serious political conflict and polarisation continued for a fairly long time, until the beginning of President Putin's second term in 2004, President Yel'tsin and his executive could attempt various reforms, most importantly economic reform, suitable for the post-Soviet democratising Russia. Thus, reform of the prosecution service which possessed more power than other traditional civil-law prosecution services also could not help but be launched. Ironically, the Prosecution Service of the Russian Republic, under the Chief of Russian Republic Prosecutor's Office Valentin Stepankov, had displayed a partisan behaviour in favour of Yel'tsin in the 'August *coup*,' but then became one of the main targets of his government and reformist factions.

The noticeably reduced power of the prosecution service was envisaged, for the first time, in a draft of the new constitution of the independent Russian Federation in October 1991,¹

¹ For the full text of this draft, see Rumyantsev (2008: 564-608).

which corresponded almost exactly to the Minister of Justice Nikolai Fedorov's ideas. In an address to judges in the same month, Fedorov emphasised that the Russian Prosecution Service, created by Andrei Vyshinskii, the prosecutor general of the USSR under Joseph Stalin, was just one of the evil legacies of the unique Soviet regime.² In particular, he criticised the prosecutors' right of general supervision over federal ministries and agencies, regional public institutions, and so forth as a totalitarian legacy, and their supervision of judges' performance as "legal atavism" (*Rossiiskaya Gazeta* 11 October 1992: 3). Most of all, Fedorov obviously seemed to have the stance that the criminal procedure should be changed into a common-law prosecution system restricting the prosecutors' wide power in criminal proceedings, given that he persevered that the role of the prosecution service should be limited to the indictment of suspects in courts. In actually, the draft of the new constitution contained three important changes in which: (i) the prosecutors' authority to supervise courts would be restricted to the supreme court; (ii) the prosecutors' right of the general supervision would be transferred into a newly planned People's Ombudsman; and (iii) the prosecutors' role would be confined to the indictment of criminal matters for trials and their investigative powers over criminal procedure would be transferred into a new special agency for a criminal investigation (Smith 1997: 356-357).

On the other hand, the reformatory pressure on the Russian Prosecution Service was also represented in another document, the Conception of Judicial Reform in the USSR, written by a few radical reformers in Moscow and, even approved by the Supreme Soviet – though it was not binding – on 24 October 1991 (Solomon, Jr. and Foglesong 2000: 10).³ A young lawyer Sergei Pashin, the head of the Department for Court Reform of the State-Legal Administration (GPU) (in the presidential administration), was best known among the authors of this conception. He pursued to draw a new 'general line' on the Russian legal system, by proposing explicit measures for judicial reform, via the conception (Huskey 1997: 327). While this document suggested a variety of specific measures to correct the essential flaws of Russian judicial system, a considerable part of it was allocated to an assessment of the necessity for reform of the prosecution service. To begin with, the conception criticised the prosecutors' power of general supervision, like the draft of the new constitution in 1991. The authors seem to have recognised that the general supervision had been misused as a powerful instrument for coercion against various state organs at

² The Ministry of Justice is *de facto* captured by prosecutors in South Korea, as noted in Chapter IV, but the Ministry of Justice has been insulated from the prosecution service in Russia.

³ In Russia, most reform plans against the prosecution service were taken, from the beginning, within a broad judicial reform, unlike in South Korea, where most of the reforms against prosecutors were attempted separately from reform of the judiciary.

federal and local levels. Correspondingly, the document recommended, for example, the prohibition of the prosecutors' supervision where no evidence of violations of laws was apparent, and the abolition of the prosecutors' power to issue compulsory prescriptions to correct activities which they consider illegal. Most importantly, the Conception of Judicial Reform also proposed a measure to curtail the civil-law prosecutors' far-reaching power over criminal procedure, by advocating the transfer of authority for the actual conduct of a criminal investigation from the prosecution service and the Ministry of Internal Affairs (MVD) to a new independent investigative agency, while admitting the preservation of the prosecutors' power to oversee the stage of the investigation. Furthermore, this document stressed the necessity for the criminal procedure to be substantively transformed from the inquisitorial system to an adversary one.⁴ In the preface of the conception, Pashin (1994: 8) himself suggested, "...proclaiming the principle of adversariality...seeing in the person of the prosecutor above all the representation of prosecutorial power and a party in the process enjoying equal right..." In this context, the introduction of a jury system was also recommended (Reynolds 1997: 376-379).

The reform plans from the two drafts clearly aimed for the elimination of the prosecutors' unique supervisory power coming from the Soviet tradition, and for the reduction of the prosecutors' power over criminal procedure by relocating their investigatory power to other agencies. Both documents obviously proposed that prosecutors' improper surveillance acts should be prevented by weakening the general supervisory function of the prosecution service. However, the draft of the new constitution in 1991, reflecting the Minister of Justice Fedorov's ideas, were aimed at the establishment of a "normal" judicial system through correction of the serious imbalance of power between judges and prosecutors in criminal proceedings, while the conception included a comparatively less cautious plans and goals on that issue. Moreover, though both the two documents set out the goal of lowering the danger of the politicisation of criminal justice through a cut in the civil-law prosecutors' enormously broad power over criminal procedure, the former aimed at a transformation from the civil-law prosecution system into a common-law one, whereas the latter did not. The conception also recommended the adoption of a few elements of an adversary system, but it was ambiguous whether the document actually or not aimed at the rearrangement of the then criminal procedure into a common-law system.⁵ Nonetheless,

⁴ The full content of this document, see "Kontseptsiya sudebnoi reformy v RSFSR" (24 October 1991).

⁵ That is, it was ambiguous whether the authority to direct the investigators of various law enforcement agencies, such as the Federal Security Service (FSB) or the MVD, would or not be continuously allowed for prosecutors, given that a part of their investigative powers would be taken away. If the prosecutors' power to

both the draft of the new constitution and the conception obviously stressed not only the reduction of enormous power which had been enjoyed by the prosecution service for a long time, but also the cautious institutional changes for the establishment of a more “normal” judicial system than previously, beyond the division between a civil-law and common-law prosecution system.

The proposal of these quite radical reforms of the prosecution service was possible because the communist hard-liners’ faction was emasculated with the failure of the *coup*, and at the same time, popular and elite expectations of state governance founded on the rule of law, especially Western concepts of the rule of law, were raised (Smith 1996: 118; Vinokurov and Bas’kina 2012: 62). In fact, this favourable condition for reform against prosecutors was quite different from the political environment in democratising South Korea. In Russia, a drastic reform of the judicial bodies, in particular the prosecution service, was widely recognised as one of indispensable changes in the transition from a totalitarian regime, whereas in South Korea, neither the public nor the elites had much interest in reform of the prosecution service itself, and the politicians leading the democratic transition also focused only on the achievement of a popularly elected presidency.⁶ That is to say, the widespread discourse for the reform, from the majority of political forces to civil society, pressured to radically reestablish the role and power of the Russian Prosecution Service. Accordingly, as noted above, the conception could be written mostly by some legal scholars and jurists from civil society, supported by the GPU, and eventually approved by the Supreme Soviet, while the shrinkage of prosecutors’ power and position within the Russian judicial system could be included in the draft of the new constitution, designed chiefly by the executive branch.

However, President Yel’tsin’s attitude towards reform of the prosecution service was quite ambiguous. Considering that the presidential administration and the executive branch actively pursued reform against prosecutors, he also seemed to at least admit the movement, however cautiously. Hence, it could be understood that the president permitted various

control the investigators during a criminal investigation would be sustained, the essential of the civil-law prosecution system would be preserved. Thus, according to the main argument of this thesis, it would be unable to make a serious effect in preventing the politicisation of criminal justice under presidentialism. In addition, it was also unclear how the investigative power taken away from prosecutors would be redistributed to the other coercive agencies, including the newly scheduled independent investigative agency.

⁶ Also because of such a political condition right after democratisation, the first civilian President Young-sam Kim (YS) rarely attempted to reform the civil-law prosecution service, while seeking to make use of its vast power for his authority, given that the president could no longer abuse the other power apparatuses, such as intelligence agencies or the military.

political and social groups to push ahead with the reform, under the emerging social mood for the abolition of the legacy of the Soviet era, right after the collapse of the totalitarian regime and the beginning of democratisation. However, Yel'tsin might be attracted to protecting the prosecutor's vested interests and to realising his short-term interest in the abuse of the power apparatus, since he could defeat the 'August *coup*,' relying on the Chief of Russian Republic Prosecutor's Office Stepankov and his powerful prosecution service (Ahdieh 1997: 41-42; *Izvestiya* 24 August 1991). Stepankov was also publicly known to promise Yel'tsin to destroy any opposition against his main reforms such as privatisation. In addition, since Yel'tsin was the first civilian president after democratisation, he also could hardly perceive his long-term interest in reform against civil-law prosecutors in preparation for their defection in the last phase of his tenure, like South Korean President YS.

Naturally, the prosecution service vigorously opposed the reformative attempts. The stance of this power apparatus could be confirmed by the critic of a special consultant for the prosecutor general, A. D. Boikov. He emphasised that the Conception of Judicial Reform had not only been prepared confidentially by a narrow circle of legal scholars, but also ignored Russian tradition, and furthermore, awkwardly combined legal components of a common-law and civil-law system (Boikov 1994: 14). In actuality, the prosecution service put pressure on the executive branch, as the GPU and the Ministry of Justice were leading the reform. In particular, prosecutors targeted the provincial and local governments as major subjects, whose governors were mostly selected by President Yel'tsin, through the use of their power of general supervision rather than the politicisation of criminal justice. According to an illustration provided by the former Deputy Prosecutor General N. A. Karavaev, in an interview with Gordon Smith in April 1993 (1996: 122-123), although the Mayor of Moscow Gavriil Popov attempted to reorganise the capital city into different prefectures with the purpose of bypassing the old bureaucracy of the city government, the Moscow City Prosecutor's Office enforced him to retreat, by deciding his plan as going beyond the mayor's official rights. Besides the example of Moscow City, a fair number of provincial and local prosecutor's offices, under Prosecutor General Stepankov, defeated the reformative acts from the governments connected closely to Yel'tsin, in 1991 and 1992.

In addition, as expected, the conflict between Yegor Gaidar's cabinet and the Supreme Soviet began around the scope and speed of economic reform in late 1991, which also formed an advantageous political opportunity structure for prosecutors to protect their own

interests. According to the 1978 Constitution of the RSFSR, as stated above, the Supreme Soviet still held control over the prosecution service through the power to appoint top rankers of this organisation, and therefore the prosecutors had no reason to be reluctant to challenge the president and executive leadership. On the other side, the parliament also had no incentive to prevent the prosecution service from suppressing the executive branch “voluntarily,” given that its conflict with President Yel’tsin was igniting. In addition, while the fearful opposition of both pro-communists and centrists intensified the debate over the economic reform accompanying a painful recession (Herrera 2001: 169), all other political issues, including reform of the prosecution service, were also bound to move farther from the social concern.⁷

The above unfavourable conditions for the reform made it harder for President Yel’tsin, who had originally taken an ambiguous attitude towards the prosecution service, to push for changes against prosecutors, despite the widespread discourse on reform against them right after democratisation. As a consequence, the political driving force for reform of the prosecution service could not help being suspended even for a while. In January 1992, taking advantage of this political opportunity, Prosecutor General Stepankov could pass the new Federal Law on the Prosecutor’s Office, maintaining most of their previous powers, quickly via the Supreme Soviet which had agreed on the Conception of Judicial Reform only three months earlier. Indeed, as discussed in Chapter V, the law included almost no major change from the Soviet period (Greenberg 2009: 12). Expectedly, the danger of the politicisation of criminal justice could never be reduced, as no revision of the prosecutors’ power over criminal procedure was taken through the redistribution of the investigative powers. Instead, some power bases for the prosecution service were reinforced. According to the Federal Law on the Prosecutor’s Office, for instance, the scope of prosecutors’ general supervision was extended to other investigatory agencies, military units and their administration offices, and prisons and places of detention (Article 2). The principle of organisational unity, centrality and hierarchy was also specified once again (Article 1). Although a few minor changes against the prosecution service were taken through the adoption of this law, they could not be recognised as meaningful changes. For example, party organisations were forbidden within the prosecution service, and prosecutors were banned from acquiring the membership of any elected or public administrative bodies (Article 4), but these prohibitions were in fact natural in any non-totalitarian country. In

⁷ Obviously, Yel’tsin and his young reformist team also intentionally downgraded other important political reform plans into minor agendas, while implementing the radical economic transformation with almost no democratic consensus (Linz and Stepan 1996: 390-394; McFaul 1995: 226).

addition, prosecutors' supervision over the activities of courts was eliminated, and six months later, the judges' *ex post* check against their decision on pre-trial detention of suspects was also permitted (Solomon, Jr. 1995: 100). These changes might also be an achievement as the first step towards a "normal" judicial system in the then democratising Russia, but could never be regarded as significant reform of the extremely strong civil-law prosecution service.⁸

In sum, President Yel'tsin did not initially oppose reform against the civil-law prosecution service, allowing his reformists to push ahead with it. However, since Yel'tsin had faced slight resistance from prosecutors, he only remained an inactive spectator, while the reformers could not prevent the prosecutors from protecting their previous enormous power in the transitional period. Of course, this could be because his political concerns were then concentrated on economic reform. Nonetheless, the president could be assumed at least to ignore reform of the prosecution service, partly because he not only already began to recognise the benefit of alliance with it – though he still seemed not to clarify his attitude towards this power apparatus –, but also encountered the risk of its counterattack, under the political polarisation. Consequently, prosecutors could succeed in blocking major changes against their collective interests, despite the hostile mood against them after the breakdown of communist system, in accordance with Hypothesis I-2 of this thesis.

The violent conflict around constitutional enactment and the failure of major reform of the prosecution service (February 1992 - December 1993)

Also in spring 1992, as examined before, Russia was still on the road brought by the great transformation of its political and economic system. Therefore, the conflict between the president and legislature on the economic reform, which had already been begun, kicked into high gear. In addition, the enactment of a new constitution, which would settle the framework of state governance and the distribution of political power, was also coming to the fore. Hence, the future path of political development was not foreseeable in Russia. In particular, as the social mood for transformation, which had been widely accepted but still confused and vague, was elaborated into the suggestion of specific reform plans or the enactment of laws on various issues – such as privatisation, state bureaucracy, military, centre-periphery relations, foreign policy, and so on –, conflicts among interested parties around each policy sporadically arose (Barany 2001; Eom 2005: 260-261; McFaul 1995;

⁸ In particular, prosecutors still held the right to investigate citizens' complaints resulting from judgments, as long as those cases were not under appeal (Article 9).

Stoner-Weiss 2001; Tsygankov 2006: 60-66).

In this context, the movement to reform the prosecution service was also not over, although it had succeeded in protecting its existing prerogatives via the passage of the Federal Law on the Prosecutor's Office in January 1992. The Minister of Justice Fedorov and a number of legal scholars still had the firm opinion that in the Russian legal system, courts would be unable to achieve their independent authority, because prosecutors still dominated criminal procedures much more thoroughly than their counterparts in any other civil-law countries. They consistently adhered to the stance that the criminal procedure should be changed into a common-law system, restricting the prosecutors' role to indictment of criminal cases for trials, as Fedorov had insisted through the draft of the new constitution in 1991. This is also why a draft bill for the establishment of an independent investigative agency was drawn up in April 1993 (Smith 1997: 359-360).

President Yel'tsin had taken an ambiguous attitude towards reform of the prosecution service, but he could also be understood not to completely give up reform of this power apparatus before the enactment of the new constitution. As evidence for this, numerous radical changes aiming at transformation of the strong civil-law prosecution service to a common-law one were included in a presidential draft of the new constitution, published by a newspaper, *Izvestiya* (30 April 1993: 3-5). It is assumed that most of the draft was designed by the legal reformists in the presidential administration and executive branch, even though it is uncertain how directly Yel'tsin's own idea was reflected in the draft. According to the document, the role of prosecutors was limited to three functions: (i) prosecutors would no longer supervise the actual conduct of criminal investigations but only examine the legality of the conduct; (ii) prosecutors would indict a criminal suspect for trials; and (iii) prosecutors would challenge the illegal actions of state organs in courts.

However, the stance of the Supreme Soviet, which possessed the right of control over the prosecution service, was different from the presidential draft of the new constitution. While the legislature had "enjoyed" the prosecutors' voluntary assault on the executive branch in late 1991, it then began to have a stronger incentive to make an alliance with prosecutors and suppress the president than before, in the deepening confrontation between the two elected bodies around the creation of the new constitution. In November 1992, for instance, Prosecutor General Stepankov addressed, "In this unstable political situation...only the prosecution service is able to protect law and order safely...the prosecutors' power must be

enhanced...” at the prosecutors’ conference for the express of their concerns about the conflict between the president and legislature. Then, the Chairman of the Supreme Soviet Ruslan Khasbulatov, who was participating at the conference, also strongly sympathised with this speech (*Izvestiya* 12 November 1992: 2).

Hence, the prosecution service could challenge the president’s faction, who attempted to reform it, without hesitation, in a situation where the legislative branch that had control of the power apparatus desperately needed its massive power because of the confrontation with the president. In particular, although prosecutors had gone against the federal and local executives through their right of general supervision until then, they began to rather directly threaten President Yel’tsin via the politicisation of criminal justice. As noted in Chapter V, the prosecution service investigated or indicted some members of President Yel’tsin’s faction, satisfying the Supreme Soviet. The Federal Prosecutor’s Office initiated criminal proceedings against the Minister of Defence Pavel Grachev and State Secretary Gennadii Burbulis on the charge of some corruptions, such as illegal sales of military property to foreign countries, on 22 April 1993 (*Rossiiskaya Gazeta* 23 April 1993). Considering that the referendum for evaluation of the president’s power and policies was held on 25 April,⁹ the prosecutors’ timing was remarkable. Also in late June, among core members of the president’s circle, the First Deputy Prime Minister Vladimir Shumeiko and the Chief of Federal Information Centre Mikhail Poltoranin became targets of the power apparatus (Filatov 1995: 169-171).¹⁰ However, Yel’tsin had no way to prevent Prosecutor General Sepankov from taking partisan behaviour, though in May, the Military Collegium of the Supreme Court ruled that the prosecutor general and his deputy had violated laws during their investigation into a criminal case involving the Committee for the State of Emergency (*Izvestiya* 20 May 1992). Until then, it seemed hard for the reformists to push ahead with changes against the prosecution service.

At the beginning of October 1993, however, the political circumstance was totally reversed, as the constitutional crisis precipitated by the violent uprising from the supporters to the legislature was coercively resolved by President Yel’tsin, who had eventually acquired aid from the military force, and the opposition leaders such as Khasbulatov and Vice-President

⁹ As explained previously, although the outcome of the referendum showed greater support for Yel’tsin, the parliament also did not give up its own position.

¹⁰ In contrast, the prosecution service plainly sheltered the Supreme Soviet. Stressing the necessity of a special commission for the investigation of high-ranking officials under the Federal Prosecutor’s Office, Stepankov said that the legislative members were not immune to corruption, but the main targets of the commission would be the executive branch and presidential administration (*Izvestiya* 29 April 1993: 2).

Alexander Rutskoi were arrested. All political initiatives were transferred to the president at that moment, and consequently, he would be able to take *de facto* an exclusive role in designing the new constitution. In the temporary absence of political competition, the prosecutors' fate also depended on the president's will, because they had lost a political opportunity to effectively block reform against them (Kostenko 1994: 26). Even the Chief of the Presidential Administration Sergei Filatov asserted that the current form of the Russian Prosecution Service should essentially be reformed (Vinokurov and Bas'kina 2012: 62).

<Table 6-1> Agendas for Reform of the Prosecution Service in the Transitional Period
(August 1991 – December 1993)

| Driving force | Reform Programmes against Prosecutors | Result |
|--|---|-----------------|
| The Ministry of Justice (Nikolai Fedorov) | <ul style="list-style-type: none"> ◦ the transfer of prosecutors' right of the general supervision to the newly planned, People's Ombudsman ◦ the confinement of prosecutors' role in criminal proceedings to the indictment of criminal matters for trials ◦ the transfer of the prosecutors' investigative power to a new special investigatory agency | failure |
| The GPU (Sergei Pashin) and Young Jurists in Moscow | <ul style="list-style-type: none"> ◦ the prohibition of the prosecutors' supervision where no evidence of violations of laws was apparent ◦ the abolition of the prosecutors' power to issue compulsory prescriptions to correct activities which they consider illegal ◦ the transfer of authority for the actual conduct of a criminal investigation from the prosecution service and the MVD to a new independent investigatory agency | failure |
| | <ul style="list-style-type: none"> ◦ the introduction of a limited jury system to nine test regions | partial success |
| The Federal Prosecutor's Office (Valentin Stepankov) | <ul style="list-style-type: none"> ◦ the forbiddance of party organisations within the prosecution service ◦ the restriction of prosecutors' acquisition of the membership of any elected or public administrative bodies ◦ the elimination of the prosecutors' supervision over the activities of courts ◦ the permission of the judges' <i>ex post</i> check over their decision on pre-trial detention of suspects <p>→ the enactment of the Federal Law on the Prosecutor's Office (February 1992)</p> | success |

On 4 October, the very date when the constitutional crisis was terminated, Yel'tsin could dismiss Stepankov from the post of prosecutor general and concurrently appointed his old friend, Alexei Kazannik. Yet it can be judged that Yel'tsin chose him to make an amicable relationship with the prosecution service rather than to reform against it. That is, Kazannik could not only satisfy the prosecutors' preference for interruption of the reform, but also enable the president to form an alliance with them. He strongly represented the interests of

the prosecution service immediately after his appointment to prosecutor general, though he had spent most of his career as law professor. According to the former Deputy Prosecutor General Marat M. Orlov, Kazannik was a strong defender of this power apparatus, to the degree of his stress that prosecutors should consistently play a major role in the Russian criminal justice system, not for their bureaucratic interests, but for the general interests of society. In addition, he is known to have strongly lobbied Yel'tsin to stop reform of the prosecution service and even to get rid of any change against the organ from the final presidential draft of the new constitution (Smith 1996: 126).¹¹ On the other side, after the constitutional crisis, President Yel'tsin also renounced his previous ambiguous attitude towards the prosecution service, and began to seek his short-term interest in exploiting it. Yel'tsin was unlikely to easily forget the threat of the prosecution service, which had gone against him through the politicisation of criminal justice, in his violent conflict with the legislature. Moreover, the president could not yet predict the prosecutors' defection in the last phase of his tenure, due to his currently high popularity and authority.

Confirming the above political dynamic, the interests of both sides were directly reflected in the new constitution finally enacted in December 1993. On the one hand, all the changes to curtail the prosecutors' powers and privileges included in several circulated drafts of the constitution were removed from the 1993 Constitution. The principle that the prosecution service is a single and centralised organisation was also stipulated once again (Article 129). On the other hand, the incumbent president acquired the decisive power to control the prosecution service. According to the second clause of Article 129 of the 1993 Constitution, a president can exercise his initiative in appointing and dismissing a prosecutor general, although the Federal Council can exercise the right to agree on the presidential initiative.¹² Eventually, both the president's short-term interest in misusing the civil-law prosecution service as a political weapon and the prosecutor's preference for protecting their collective interests were satisfied, and as a result, major reform of the prosecution service could not be achieved also at this time.

In short, prosecutors enforced President Yel'tsin, whose reformists, especially the Minister

¹¹ Kazannik has emphasised that he made efforts to maintain a non-partisan position as prosecutor general (*Moskovskie Novosti* 30 September 2003: 8), which could also contribute to placating the president in the way of prosecutors' voice, even though the authenticity of his testimony is uncertain.

¹² Even though the Federal Council (upper house) would not approve the president's initiatives, the president could appoint an acting prosecutor general and *de facto* fire a current prosecutor general by suspending his job through presidential decree.

of Justice Fedorov¹³ and Pashin, were trying to impose major changes on the prosecution service, to realise its utility clearly, by suppressing him via the politicisation of criminal justice against some members of his faction, in the circumstance of fierce conflict between him and the Supreme Soviet. Even since Yel'tsin coercively solved the impasse with the parliament, Kazannik's prosecution service gave him the incentive to form an alliance with it through both of its voice or organisational resistance against him. In fact, President Yel'tsin's choice was not distinguished from South Korean President DJ's abandonment of reform against the prosecution service right after the 'cloth lobby' scandal. In late 1993, the Russian prosecutors were again successful in blocking reform against them, as with the passage of the Federal Law on the Prosecutor's Office in January 1992, which corresponds with Hypothesis I-2 of this thesis. Even their half-faced organisational hierarchy could not prevent them from making a collective action to defend their collective interests. For about 10 years afterwards, during President Yel'tsin's two terms and Putin's first term, most of large-scale reform programmes were quickly suspended, but only some minor changes of the prosecution system were achieved, which is examined below.

6. 1. 2. The backslidings in reform of the prosecution service in President Yel'tsin's two terms

While prosecutors succeeded in protecting their main prerogatives, the reformists such as Pashin could not achieve many results relevant to reform of the civil-law prosecution service, in the chaotic period from 'August *coup*' in 1991 to the constitutional crisis in October 1993. The prosecutors' enormously broad power over criminal procedure and authority of general supervision over federal and local organs were rarely curtailed. As stated before, in 1992, the prosecutors' power to supervise courts was removed and the *ex post* check against their decision on pre-trial detention of suspects was permitted for judges, but these changes still entailed clear limits. In addition, though a limited jury system was introduced in July 1993, as recommended by the Conception of Judicial Reform, this was adopted simply as an 'experiment.'¹⁴ First of all, jury trials were implemented only in five regions, and would be followed some months later by four additional regions. Moreover, at

¹³ Nikolai Fedorov resigned the post of the minister of justice in March 1993. Some observers attributed his sudden resignation to his frustration with the intrusive role of the GPU (Huskey 1995: 125). Even since Fedorov's resignation, conflicts between the Ministry of Justice and the GPU occurred, though the clashes, attributed to the redundancy of their jurisdiction, seemed ironic in the respect that both bodies were the most enthusiastic supporters of judicial reform in Russia.

¹⁴ However, the jury system was more disadvantageous to judicial officers than in South Korea, considering that jurors could decide question of guilt or innocence in Russia.

least 99 new judges were required for the ‘experiment,’ but even their appointment was delayed because the Supreme Soviet was dissolved in October 1993 (*Izvestiya* 27 October 1993). Nonetheless, the reformists did not abandon reform against the prosecution service, irrespective of Yel’tsin’s preference, even after the enactment of the 1993 Constitution. In particular, Pashin and the GPU struggled to preserve the momentum for reform to curtail the prosecutors’ massive power, by establishing a new federal law, the Criminal Procedure Code, and consolidating the jury system.

The Ministry of Justice and the GPU attempted to solidify the courts’ authority of *ex ante* pre-trial detention, search, and so forth, ensured by the 1993 Constitution, by enacting the Criminal Procedure Code. Even though a defendant could request a judge to *ex post* review the lawfulness of initial decisions on his detention from June 1992, investigative agencies still *ex ante* conducted these pre-trial coercive measures only with the prosecutors’ consent. This leftover from the Soviet era was never suitable for the democratic period, given the risk of violation of human rights. Thus, the drafts of the Ministry of Justice and the GPU specified that investigators should acquire a warrant for arrest, detention, search, seizure, and wiretapping of criminal suspects from courts (Solomon, Jr. 1995: 102).¹⁵ However, the authorisation of the judges’ right to issue warrants could not be regarded as major reform of the prosecution service, even though this was an apparently radical change at that time in Russia. In particular, the prosecutors’ enormously broad power over criminal procedure, coming from their own investigative power, the authority to control investigative bodies, the exclusive right of indictment, and the *Opportunitätsprinzip*, would hardly be reduced, and consequently the broad power could be still misused for the politicisation of criminal justice, under presidentialism, according to the main arguments of this thesis.

By contrast, if the jury system would be expanded from the test regions to others and solidified, the institutional model would be able to contribute to the rationalisation of prosecutors’ immoderate power in short-term and long-term perspectives. To begin with, the jury system, as “democratic conscience,” would keep a check over law enforcement agencies, even including the judiciary (Reynolds 1997: 379). Certainly, given that the prosecutor’s pre-trial actions *per se* still injured elected politician via the politicisation of criminal justice, the enormous power of the prosecution service could not strikingly be

¹⁵ However, the draft of the Criminal Procedure Code was known to be seriously flawed because the key officials of the GPU, including Pashin, had written this document too hastily (Solomon, Jr. 1995: 102). Perhaps, Pashin was likely to try to complete the new criminal procedure as soon as possible, considering his enthusiasm for judicial reform, particularly against the prosecution service. As discussed previously, the Concept of Judicial Reform, to a large extent prepared by him, was also not a solid draft.

undermined by the jury system. Nevertheless, the jury system could eventually guarantee the equal relation between a prosecutor and defender, not only in trials, but also in the pre-trial stages right after arrest of the defendant, by weakening the inquisitorial elements of the Russian criminal justice system and actually strengthening the adversarial elements of a common-law prosecution system. Hence, Pashin and his allies also expected that the jury system would contribute to the establishment of a more fair criminal procedure in the long term, and actively pushed for it, with the donations of some Western organisations such as the American Bar Association or the Ford Foundation (Huskey 1999: 158).

However, almost all state bodies, except for Pashin's Department of Court Reform¹⁶ and the Ministry of Justice, firmly opposed these reform programmes. First of all, prosecutors furiously resisted the restriction of their coercive measures in pre-trial criminal procedures and the consolidation of a jury system. They regarded the increase in the judges' power in criminal proceedings as "shrieks, menaces, and provocations" to them (*Izvestiya* 30 May 1995: 4). Also, the prosecution service constantly opposed the jury system on the grounds of the citizens' subjective and amateur judgment (*The New York Times* 19 December 1993), but the opposition was mostly because of the prosecutors' fear of degeneration into a "side" in the adversarial system. The other law enforcement agencies such as the MVD or the Federal Counterintelligence Service (FSK: the past title of the FSB) also reacted against these reform plans. Indeed, not only the authorisation of judges' right to issue warrants of arrest, detention, and search, but also the full-scale introduction of the jury system would impose more restrictions on all the investigative agencies – which had taken the pre-trial coercive measures at their discretion only with prosecutors' consent – than ever, whereas most of other reform programmes on the prosecution service had only a distributive effect of transferring some parts of the prosecutors' power to the other agencies. As long as the investigators could not be allowed to obtain warrants, directly from judges, without the prosecutors' consent, they would have to pass one more legal hurdle. In particular, a fair number of semi-legal practices of their criminal investigation, under the connivance of prosecutors, would be constricted in jury trials. Furthermore, the Ministry of Finance also went against the extension of jury system by reason of a massive cost for the institution, although this ministry was relatively less involved in this reform. The cost for jurors was approximately estimated "more than it would cost to pay seven judges for each day of trial"

¹⁶ In early 1995, the GPU also began curbing its own department, the Department of Court Reform, which is explained below.

(Reynolds 1997: 387).¹⁷

The most critical point was President Yel'tsin's will for the reform plans. At least until the introduction of the jury system in July 1993, he was unlikely to strongly go against these changes in the prosecution service. Until then, his attitude towards prosecutors was still ambiguous. As explained above, however, Yel'tsin began to clearly seek his short-term interest in abusing the prosecutors' enormous power under the alliance with them, rather than the long-term interest in reforming against them, before and after the enactment of the 1993 Constitution. The president needed the power of the civil-law prosecutors, especially since anti-Yel'tsin forces, including the Communist Party of the Russian Federation (KPRF) and the Liberal Democratic Party of Russia (LDPR) occupied the majority of legislative seats in the first Duma election in December 1993.¹⁸ In this context, President Yel'tsin ordered Prosecutor General Kazannik to neglect the legislative decision for the amnesty of Khasbulatov and Rutskoi, and to arrest the opposition leaders again, although this order was not followed.¹⁹

In fact, Yel'tsin had little incentive to support the creation of a new Criminal Procedure Code ensuring the judges' right to issue warrants for the pre-trial coercive measures, and the consolidation of the jury system, given that these changes were against the interests of the prosecution service, though the GPU in the presidential administration and the Ministry of Justice pushed ahead with them. The enactment of the Criminal procedure Code was indefinitely postponed. Rather, the president *de facto* deprived judges of even the right to *ex post* review the pre-trial arrest, detention, search, seizure, and wiretapping, in June 1994 when the reformists struggled to make the Criminal Procedure Code (Solomon, Jr. 1995:

¹⁷ The jury system was opposed even by judges who were afraid of weakening of their current rights. Recognising the strong opposition from almost all state bodies, Huskey (1999: 156) was so surprised that Pashin passed even the legislation on the 'experiment' of jury system in July 1993.

¹⁸ On the other hand, the State Duma was not a critical actor relevant in reform of the prosecution service during Yel'tsin's period, although it could be supposed to have had interest in curtailing the prosecutors' enormous power available for the president. In autumn 1995, the legislative branch simply considered a bill for expanding the jury system but faced resistance from the executive branch, and as a result, failed in passing the legislation (Dline and Schwartz 2002: 105). This seems to have been partly because legislators could not make a collective action for the reform, in the situation where a number of them and their aides were structurally involved in corruption, and hence could be always under criminal investigations (*Izvestiya* 27 February 1997; 30 May 1997). More importantly, according to Professor Bill Bowring in the interview with me (2 December 2013), the KPRF had the strong Soviet nostalgia, even regarding the great power and position of the prosecution service. In this respect, the communist majority consistently hesitated to support the Western-oriented judicial reform, in particular the jury system (Boylan 2002: 10-11).

¹⁹ On the other hand, as mentioned above, Prosecutor General Kazannik did not follow Yel'tsin's order to neglect the amnesty declared by the State Duma and to arrest Rutskoi and Khasbulatov again in early 1994. Then, Kazannik's decision did not run counter to Hypothesis I-1 but also corresponded to Hypothesis I-2, considering that he made the decision not to politically betray the president but to protect the prestige, as a collective interest, of the prosecution service.

100-101). According to the Presidential Decree on Urgent Measures for the Defence of the Population against Banditry and Other Manifestations of Organized Crimes, if evidence of suspects' involvement in organised crimes was found, investigative bodies would be given unusual powers of search and seizure for confidential business and financial files, and even the right to imprison the suspects for 30 days without indictment.²⁰ The jury system could also not be extended to more than the nine test regions in the stage of 'experiment.' While no more regions had taken the jury system since 1996, Altai Republic clarified its intention of stopping jury trials, and Riazan totally threw away this institutional model (Solomon, Jr. and Foglesong 2000: 132). Instead of pushing ahead with reform against the prosecution service, as expected, Yel'tsin enjoyed the priority in exploiting the power apparatus as a political weapon, although it could not be regarded to work as effectively as the South Korean Prosecution Service, owing to its half-faced organisational hierarchy. Before the 1996 presidential election, as examined in Chapter V, he threatened several critical media and politicians, relying upon the Acting Prosecutor General Alexei Ilyushenko. Later, Prosecutor General Yuri Skuratov also served his prime appointer, President Yel'tsin, in a partisan manner, until the last year of the president's second term (Holmes 1999: 78).²¹

Meanwhile, the most important reformer Pashin's political influence sharply declined. In early 1995, when President Yel'tsin was aggressively exploiting the prosecution service for the politicisation of criminal justice, Pashin suggested the raising of his department to the 'head agency' for judicial reform. However, his immediate superior, the Head of the GUP Ruslan Orekhov furiously urged the Chief of the Presidential Administration Sergei Filatov to block Pashin's ambitious plan. As a result, his department was rather reduced in scale, and even renamed to the Department of Criminal Law and Procedure. Moreover, Pashin finally resigned in September 1995. Then, Olga Chaikovskaya, the old conscience of the Russian legal community, warned of "the 'horrible' consequence that Pashin's departure would have for law reform in general" (Huskey 1999: 159). With his resignation, all the reform plans on the prosecution service *de facto* completely ceased. Afterwards, no reform against the civil-law prosecutors was launched until the end of Yel'tsin's tenure.

In fact, the suspension of reform of the prosecution service meant more than prosecutors effectively pending off challenges to their prerogative powers. In early 1995, when Pashin

²⁰ For the full text of this decree, see Ukaz Prezidenta RF o neotlozhnykh merakh po zashchite naseleniya ot banditizma i inykh proyavleniy organizovannoy prestupnosti (14 June 1994).

²¹ Yuri Skuratov was also a strong representative of the interests of the prosecution service, considering that he argued, "Separatism could seize Russia without a highly centralised prosecution service" (*Ogonek* 10 October 1996: 14-15).

began to decline, two other legal reformers, Alexander Larin and Valerii Savitskii, met the *de facto* last chance to reform the prosecution service, while carrying out the task to amend the Federal Law on the Prosecutor's Office in harmony with the 1993 Constitution as well as the Conception of Judicial Reform, within President Yel'tsin's tenure.²² Nevertheless, the prosecutors' far-reaching power was not curtailed but their organisational strength was rather reinforced with the amendment of the Federal Law on the Prosecutor's Office in November 1995. For instance, the revised law ensured the principle that the prosecution service was the foundation of the supreme state supervision, guaranteeing the prosecutors' supervision on federal, provincial and local governments, commercial and non-commercial organisations, and the observance of citizens' basic rights and freedom (Oda 1999: 431).²³ Moreover, Yel'tsin even ordered all the executives and legislatures in the federal subjects to assist the 275th anniversary of the Russian Prosecution Service, via presidential decree, in June 1996.²⁴

In short, some reformers attempted to reform the civil-law prosecution service through the enactment of the Criminal Procedure Code as well as the consolidation of a jury system, but various forces, including prosecutors themselves, strongly resisted the attempts, during President Yel'tsin's period. Above all, the president who had already held the prosecutors' hand in the process of enacting the 1993 Constitution, completely gave up his uncertain will for reform against them, but chose to make an alliance with them in the political conflicts after the anti-Yel'tsin forces, such as the communists or nationalists, occupied a majority in the State Duma. Even the backslidings in reform of the prosecution service appeared, although the president could not avoid the defection of prosecutors at his last phase. In other words, President Yel'tsin, who had faced the civil-law prosecutors' strong voice, and organisational resistance at a weak level, like most of the other presidents in a similar situation, no longer pursued his long-term interest in reforming against them, but instantly sought his short-term interest in abusing their great power for the politicisation of criminal justice during most of his tenure, in accordance with Hypothesis I-2 of this thesis.

²² In particular, these reformers perceived that the prosecutors' resources and time allocated to the general supervision should be significantly reduced.

²³ According to Greenberg's assessment (2009: 14), the prosecution service even became similar with the Soviet Procuracy in the Brezhnev period, because of the revision of the Federal Law on the Prosecutor's Office in 1995.

²⁴ For the full text of this decree, see Ukaz Prezidenta RF o 275-letii Rossiiskoi prokuratury (7 June 1996).

6. 1. 3. Minor reform of the prosecution service in President Putin's first term

As stated above, Vladimir Putin could win the second Russian Presidency in March 2000, through Yel'tsin's sudden resignation and the notable election performance of his party, Unity, in December 1999. Putin's popularity was so high because of his bold and strong measures against the Second Chechen War, and relatively fresh and charismatic image compared to Yel'tsin's. Until then, political uncertainties and the 'rise and fall' of the presidential power had occurred along with the great transformation of the Soviet system, but the most important political actor had been President Yel'tsin, no matter what was said, during the transitional period. However, Putin's rise to presidency brought the potential of a drastic change to Russian politics once again after democratisation. Hence, prosecutors who had successfully protected their own roles and prerogatives in President Yel'tsin's period might be faced with new challenges. Most of all, the issue of enactment of the Criminal Procedure Code, which had been deliberately delayed despite the passage of the new constitution in December 1993, could not help but arise.

To begin with, President Putin had more obvious reasons to recognise the necessity of reform against prosecutors, than his predecessor, Yel'tsin, who had dumped the task of judicial reform, particularly regarding the prosecution service, on a few reformists but his own reformatory will had been swayed by changeable political situations. This could be partly attributed to his distinctive educational background. In 1975, Putin graduated from the Law Faculty of Leningrad State University. Also in the Soviet era, law school students took training courses not only on the technical dimensions of criminal law or procedures, but also on the abstract concepts of due process or human rights in criminal proceedings (Smith 2005: 181). Especially in the university, Putin was one of the students of a famous democrat, Anatolii Sobchak. Therefore, he could be regarded as having acquired stronger understanding of the legal profession, in particular about criminal procedure rules, than Yel'tsin. As evidence of Putin's legal mind, he has been widely known to object to death penalty system. In July 2001, Putin asserted, "The state must not arrogate to itself a right...the right to take away a person's life...The state will not eliminate cruelty but only being more cruelty through harsher punishments" at an international conference on judicial and legal reform organised by the World Bank (*Vremya MN* 10 July 2001: 1).

Moreover, President Putin clearly recognised that judicial reform, including changes of the

prosecution service through the enactment of the Criminal Procedure Code, was essentially required for the prosperity of the domestic economy and investment of foreign capitals. In summer 2000, he actually launched a programme for drafting new legislation, amending relevant laws, and improving federal ministries and agencies, with a reform-minded team of economists under the Minister of Economic Development German Gref. Obviously, the main goal of this ‘Gref Programme’ was to provide stable and trustworthy legal institutions for both domestic and foreign potential investors. However, not only the enactment of a new Criminal Procedure Code, but also the rationalisation of law enforcement agencies, such as the prosecution service or the MVD, was included in the programme (Å slund 2004: 402-404; Solomon, Jr. 2002: 119).

Above all, Putin witnessed the violent conflict between Yel’tsin and Prosecutor General Yurii Skuratov, in the last phase of his presidential tenure, and is widely known to have involved himself in Skuratov’s decline attributed to the scandal of his ‘sex video,’ as noted in Chapter V. Thus, President Putin could clearly perceive his long-term interest in reform to curtail the enormous power of the civil-law prosecution service, for preparation of the defection of the power apparatus in his last moment, contrary to the first President Yel’tsin after democratisation, who had a difficulty in predicting the prosecutors’ betrayal in his last phase.

Therefore, President Putin could be supposed to possess a will to reform the prosecution service, either slightly or drastically, at least right after his inauguration. His reformative will was demonstrated also by his behaviour, connected to judicial reform, before and after his rise to presidency. Putin, as prime minister in August 1999, already presented a new notion of the ‘dictatorship of law’ for the Russian legal system. Moreover, he emphasised the need for transformation of the Russian state into a democratic and law-based ‘strong state’ in his public speech when taking the role of acting president in December 1999.²⁵ In order to “literally” establish the ‘dictatorship of law,’ the prosecution service could not be excluded from the targets of his reform programmes, given that no improvement of the Russian legal system was possible without changes against prosecutors. Most of all, the

²⁵ As explained below, Putin’s ‘strong state’ could be interpreted not as a democratic one but the statism connected to an autocratic one overwhelming society. Actually, the state functioned in the latter form during Putin’s second term (Lee 2010). However, Putin was already somewhat predicted, from the beginning of his first term, to build the ‘strong state’ similar to an electoral authoritarian regime, considering that the ‘law-based’ state, the original concept of Sobchak – who had substantially influenced Putin – was less liberal than his political reputation, and rather meant that the state should stand over any party or other institutional entities (Hill and Gaddy 2013: 50).

president wished to choose the reformist against the prosecution service, Dmitry Kozak, for new prosecutor general, although he advanced the Acting Prosecutor General Vladimir Ustinov to the highest post, appointing Kozak simply to the head of a working group for preparation of the new Criminal Procedure Code within the presidential administration in November 2000 (Smith 2005: 174). Considering that Kozak has constantly criticised that prosecutors held both the powers to investigate and indict criminal suspects (Yasin 2012: 383), Putin certainly had a will for major reform of the prosecution service, such as the separation between the two functions over criminal procedure, at the beginning of his first term.

The composition of the State Duma also changed in the legislative election of December 1999. The share of the KPRF and the LDPR decreased from about 40 to 25%, and the relatively liberal forces such as the Union of Right Forces (SPS) occupied no small portion in the legislature. Thus, the probability that the State Duma would support major reform of the prosecution service to a more liberal form was raised, compared with Yel'tsin's period. For example, in spring 2000 when a new working team for enactment of the new Criminal Procedure Code was composed, Pavel Krashennnikov, belonging to the SPS, took a role as the head of the team (Smith 2005: 174). Above all, Putin's creation of the 'party of power' was different from Yel'tsin's choice not to make his own party (Breslauer 1999; Linz and Stepan 1996: 394). As stated above, Unity, which was *de facto* regarded as Putin's party, not only obtained the second most seats, after the KPRF, in the 1999 election, but also combined itself with the Fatherland-all Russia (OVR) into the majority ruling party, United Russia, in December 2001. Therefore, the president's policies could be supported by the legislature to a certain extent from the early part of his term. In practice, although it was undoubted that Putin's initiative was decisive,²⁶ the legislator Yelena Mizulina, who later joined the SPS, presented the bill of the Criminal Procedure Code, and the State Duma officially passed it in November 2001 (*Novye Izvestiya* 11 July 2002).²⁷

As always, the prosecution service was strongly opposed to this movement of reform against itself. Specifically, before and after the enactment of the new Criminal Procedure

²⁶ It is well known that Kozak's group within the presidential administration and the working team within the legislature closely cooperated to make the Criminal Procedure Code (Bowring 2013a: 169; Mizulina 2002: 16).

²⁷ At the time when the code was passed by the State Duma, the largest party in the legislative branch was still the KPRF, which could not accurately calculate the benefits from reform of the civil-law prosecution service. But KPRF also had no reason to desperately resist the legislation, on the one hand, because Putin and the majority of legislative factions supported it, on the other hand, as explained below again, because the code did not contain radical elements and therefore even prosecutors eventually accepted it.

Code, prosecutors publicly suggested their own causes for objection. First, they responded to the criticism on their enormous power, insisting that the Russian Prosecution Service had no much greater role and power than those of other developed democratic countries. For example, according to the Deputy Head of the Legal Security Administration of the Federal Prosecutor's Office V. Bessarabov (2000: 38-39), the Russian prosecutors' role and power were not too different from those of other civil-law countries such as Germany, France, and Japan. Moreover, he argued that even the typical common-law prosecutors of the U.S., who are most dissimilar with the Russian equivalents, do not only carry out the role of indicting criminal suspects for trials. Also regarding the strong criticism on the uniqueness of the Russian Prosecution Service, prosecutors justified this by emphasising the unique history of Russia. For instance, Deputy Prosecutor General N. Makarov said "Our situation is distinctive...It is apparent that prosecution services are not uniform in their functions...There are, instead, several national models for prosecution system and the execution of justice" at a conference held by the Federal Council.²⁸ Above all, prosecutors opposed any change to weaken the power of the prosecution service on the grounds of an increase in serious crimes in Russia (Ashurbekov 2002: 2-5). However, the prosecutors' objections could be considered their typical voice, as they could be regarded as suggesting these causes mainly in order to protect their prerogatives.

In this circumstance, it was not easy for Putin to push ahead with major reform of the prosecution service. In particular, he had already abused the prosecutors' enormous power over criminal procedure to destroy his political enemies at the beginning of his term. As examined above, the prosecution service played a critical role in the downfall of the two oligarchs, Vladimir Gusinskii and Boris Berezovskii. It cannot be denied that the president sought his short-term interest in utilising the power apparatus in these affairs.²⁹ However, Putin could not totally abandon the enactment of the Criminal Procedure Code, as one of his pledges which he had focused on from before his inauguration. Given that President Putin not only ordered the reformist Kozak to prepare the code, right after the fall of the two oligarchs, in November 2000, but even actively intervened with the chiefs of various interested agencies or departments that had been reluctant to any change (Mizulina 2002: 16), it was clear that he had not yet totally given up reform against prosecutors until then. Nonetheless, as top-ranking prosecutors were publicly opposing reform, especially through

²⁸ See *Rossiiskaya yustitsiya* no. 4 (2002): 12.

²⁹ The appointment of Ustinov to new prosecutor general could be understood in the same context. It is known that Yel'tsin strongly urged Putin to choose Ustinov, instead of Kozak, in order to protect his 'family,' and Putin also judged that it was premature to select the reformist for the crucial position (Truscott 2004: 190).

their own journal *Zakonnost'*, Putin's will was also bound to decline. The conflict with the prosecution service would be risky for the president in the situation where the opposition parties were still thriving. That is, he could be provided an incentive to narrow the scope of reform against the prosecution service. On the other side, prosecutors could not help but have a difficulty in putting off the enactment of the Criminal Procedure Code, as the legislation had already been delayed for about 10 years after democratisation. It is still uncertain whether the then prosecution service had a plan for threatening Putin through a partisan initiation of criminal proceedings against some members of his political faction, or not. However, undoubtedly, it could be a more rational strategy for prosecutors to minimise the intensity of changes against themselves than to quickly judicialise politics via criminal proceedings, in the circumstance where a popular president tried to ratify the code, and the State Duma did also not strongly oppose it.

The above political dynamic among main actors were exactly reflected in the Criminal Procedure Code passed in December 2001. First of all, as mentioned in Chapter V, the code defined that courts have the exclusive authority to issue a warrant which allows not only investigators of any law enforcement agencies but also prosecutors themselves to arrest (custody) or detain a criminal suspect more than 48 hours (Butler 2009: 286-287). In addition, a defendant obtained the right to have his defence lawyer during investigation, and if his testimony or other evidence was presented without his lawyer in this phase, the testimony could be repudiated by him in court (Article 56: 75). Moreover, the prosecutors' participation in all criminal cases became obligatory (Article 246). These changes had not a little importance in the respect that the Russian criminal justice system broke from the extreme inquisitorial system in the Soviet era, and fulfilled some of the key provisions of the 1993 Constitution (Boylan 2002). In particular, for the first time after democratisation, judges acquired the authority to *ex ante* check the pre-trial coercive measures which prosecutors had exclusively controlled. Nevertheless, the code has not always coincided with actual practices (Yasin 2012: 383). Prosecutors still enjoyed supremacy over judges, and the latter habitually perceived the former as "a comrade, friend, and brother, but a defence lawyer as an opponent" for a long time (*Novaya Gazeta* 7 February 2004). Most of all, the essence of the civil-law prosecution system remained in the Criminal Procedure Code, and the prosecution service was still the strongest actor in the criminal justice system, though some elements of the extreme inquisitorial system were abolished, and the

pre-trial criminal procedure became closer to a “normal” one than ever (Pormoski 2008).³⁰

<Table 6-2> Agendas for Reform of the Prosecution Service in President Putin’s First Term (January 2000 – March 2004)

| Driving force | Reform Programmes against Prosecutors | Result |
|---|---|-----------------|
| President Putin, and Liberal Forces in the State Duma | ◦ the separation between investigatory and prosecutorial functions in criminal proceedings | failure |
| | ◦ the expansion of a limited jury system throughout entire Russia | partial success |
| | ◦ the authorisation of the judges’ right to issue a warrant which allows not only investigators of any law enforcement agencies, but also prosecutors themselves to arrest (custody) or detain a criminal suspect more than 48 hours ◦ the authorisation of a defendant’s right to have his defence lawyer during investigation ◦ the invalidation of a defendant’s testimony or other evidence, if they are presented without his lawyer during investigation → the enactment of the Criminal Procedure Code (December 2001) | success |

That is, the prosecutors could still dominate all the pre-trial stages of a criminal proceeding, and consequently exercise enormously wide power over centralised criminal procedure. Thus, these moderate changes could be understood to satisfy not only the prosecutors’ interest in protecting their prerogatives, but also President Putin’s interest in reforming the prosecution service to even a little extent. However, Putin *de facto* half-willingly gave up on large-scale reform of the prosecution service, when encountering the prosecutors’ voice, though he normalised the abnormal criminal procedure in the totalitarian period. Instead, the president could maintain the alliance with the civil-law prosecution service and hence use it for the politicisation of criminal justice against his political enemies. The principle of the ‘dictatorship of law,’ which Putin had claimed from before his rise to the presidency, was indefinitely reserved, but the ‘dictatorship by law’ as a metamorphosed principle was often employed by him (Remington 2006: 226-229). For example, in late 2003, Prosecutor General Ustinov and the prosecution service he headed were the most pivotal players in the

³⁰ As stated in Chapter V, Professor Bill Bowring also stated that the new code could be regarded as a great change from the Soviet criminal justice system, in the interview with me (2 December 2013). In the same context, along with the enactment of the Criminal Procedure Code, the jury trial for high-profile crimes was scheduled to expand throughout the entire Russia on 1 July 2003. Although prosecutors lobbied for this expansion to be postponed to January 2004, the constitutional court ruled that the jury system should be held, on a no more experimental basis, in all the territory of Russia from the original date (*The New York Times* 1 July 2002). Nonetheless, the code permits judges to dissolve juries when the former perceives the latter’s decision as improper one (*Novye Izvestiya* 11 July 2002). This is not different from the small revision of the Criminal Procedure Act, in 2007, in South Korea.

process of downfall of the oligarch, Mikhail Khodorkovskii and his oil giant, Yukos.

In short, President Putin had a will for reform of the prosecution service at the beginning of his first term. However, his will for reform could not help being undermined, since he was not only tempted to misuse the civil-law prosecutors' far-reaching power over criminal procedure, but also encountered their voice. Eventually, the president had to fulfill most of the prosecutors' interests, but gained only a little concession from them, by enacting the Criminal Procedure Code with no revolutionary change. In accordance with Hypothesis I-2 of this thesis, President Putin was successful only in minor changes of the prosecution service, under the institutional combination between the civil-law prosecution system and presidentialism, at least during his first term. However, the political conditions of Russia were totally altering throughout the end of his first term and the beginning of his second term, and the relationship between the president and prosecutors was subtly changing, which is discussed in the next section.

6. 2. Electoral authoritarian regime and large-scale reform of the prosecution service in president Putin's second term

As Chapter IV and above section of this chapter explained, in South Korea and Russia after democratisation, most presidents abandoned their long-term interest in major reform of the prosecution service, but sought their short-term interest in misusing the prosecutors' great power, when facing their voice, or organisational resistance at a moderate level. Not only President YS and DJ in South Korea but also President Yel'tsin and Putin (in his first term) demonstrated such activities. Unusually, South Korean President MH never gave up his long-term interest in major reform of the prosecution service. Nonetheless, he could not succeed in the reform, suffering a heavy political blow owing to the prosecutors' strong organisational resistance and the corresponding politicisation of criminal justice against him. By contrast, Russian President Putin succeeded in large-scale reform of the civil-law prosecution service in his second term. How did Putin exceptionally achieve this? This section attempts to answer this question, verifying Hypothesis III of this thesis: if political competition is eliminated, civil-law prosecutors would be unable to make an organisational resistance against an incumbent president.

6. 2. 1. The emergence of an electoral authoritarian regime at the beginning of President Putin's second term

As examined above, President Putin selectively eradicated the three who had ruffled him, among the oligarchs enjoying a strong political influence during the Yel'tsin era, via the politicisation of criminal justice, until the end of his first term. Such an activity, on the one hand, attracted high popularity, as it represented his eradication of the corrupt relationship between politics and business, which had been regarded as an indirect but critical cause of the economic crisis in 1998. However, on the other hand, it demonstrated his authoritarian character as well. In fact, President Putin had steadily prepared to consolidate his vertical power, prior to his punishment of Khodorkovskii. He carried out bold institutional reforms over centre-periphery relations, the party system and so on, reinforced the 'party of power,' and replaced the composition of power elites in phases, during his first presidential term. Putin launched all these changes for the purpose of the establishment of a 'strong state,' but the reforms could be considered a cornerstone for him to build an electoral authoritarian regime.

To begin with, in the dimension of centre-periphery relations, President Putin divided 89 federal subjects in the Russian territory into the seven federal districts (*okrugs*) in May 2000 through presidential decree, and dispatched the envoy he appointed to each district (Orttung 2001: 343-344). He already circuitously spoke his mind, saying "Everyone was saying that the *vertikal*, the vertical chain of government, had been destroyed and that it had to be restored" in an interview (Putin 2000: 129). As a result, the federal government's vertical control over provincial and local governments which had made centrifugal forces during Yel'tsin's period began to be tightened. Moreover, in August, Putin established the legal foundation for federal centralisation by totally amending the Federal Law on General Principles of Organisation of Legislative and Executive Bodies of State Power of the Subjects of the Russian Federation.³¹ According to the revised law, a current president can exercise the power not only to dismiss a governor but also to disband a provincial or local legislature, when the provincial or local government passes legislation in violation of the constitution or federal laws. On the other hand, in the same month, he got rid of the institution through which regional governors and chairmen of provincial legislatures had

³¹ For the full text of this legal amendment, see Federal'nyi Zakon RF o vnesenii izmenii i dopolnenii v federal'nyi zakon ov obshchikh printsipakh organizatsii mestnogo samoupravleniya v Rossiiskoi Federatsii (4 August 2000).

automatically obtained the seat of the upper house, and consequently stripped them of the privilege of exemption from legal liability, via the ratification of the Federal Law on the System of Forming the Federal Council of the Federal Assembly of the Russian Federation (Hahn 2001: 506-508; Stoner-Weiss 2006: 108). Thus, not only their political status was considerably lowered, but also their political influence on the federal government could not help being undermined.

In addition, President Putin tightened the Kremlin's control over political parties, passing the Federal Law on Political Parties in July 2001. The KPRF opposed the bill but lacked the number of legislators required for interrupting the legislation (*The New York Times* 8 February 2001). According to the new law, an organisation must satisfy several standards in order to acquire the status of political party from the Ministry of Justice. For instance, a political party had a duty to take part in elections (Article 37). Also, a political party had to specify its own programme, including its goals (Article 21; 22). Above all, according to Article 3, a political party was required to have a minimum of 10,000 members, with no fewer than 100 members in its provincial branches, in more than 45 federal subjects among 89.³² It cannot be totally denied that this law was enacted to break with the situation, in which too many small parties were rampant, and to transform the extremely fragmented party system into a moderate multi-party one (Holmes 2005: 81-82). However, a president could *de facto* manipulate the party system, because the law enabled only a few parties to succeed in the registration, and moreover, the federal government to interrupt the creation of a political party at its disposal (Balzer 2003: 200-202). Most significantly, the ruling party, Unity, was combined with the OVR, led by Yurii Luzhkov, and two other minor legislative factions in the form of a 'hostile takeover,' and was finally created as the huge Kremlin-sponsored party, United Russia, in December 2001 (Gel'man 2008: 918). This ruling party, with an absolute majority, would be able to pass almost all bills suggested by President Putin and his ministries (Remington 2005; Smyth 2002).

Moreover, as noted in the last chapter, in President Putin's first term, a comprehensive replacement of power elites occurred, which was the most important factor contributing to the 'consolidation of vertical power.' In particular, Putin selected liberal technocrats and former officers from power organs, especially the KGB (*siloviki*), for important state posts. Most of them had their origin in St. Petersburg and personal ties with Putin. The Chief of the Presidential Administration Dmitrii Medvedev, Presidential Envoy Dmitrii Kozak, the

³² For the full content of this law, refer to Federal'nyi Zakon RF o politicheskikh partiakh (11 July 2001).

President of Gazprom Alexei Miller, the Deputy Chief of the Presidential Administration Vladislav Surkov, and the Minister of Finance Alexei Kudrin were among those regarded as belonging to the former group. These liberal technocrats were relatively liberal, but different from the Western liberals. Especially, some members of the former clique even had authoritarian views (Kryshtanovskaya and White 2005: 1071; Shevtsova 2005: 235). On the other hand, the latter group was considered to include the Deputy Chief of the Presidential Administration Igor Sechin, Presidential Advisor Viktor Ivanov, the Chief of the FSB Nikolai Patrushev, the Minister of Defence Sergei Ivanov, Prosecutor General Vladimir Ustinov, and so forth. As officers of the military and security agencies had firm loyalty to their superiors by their nature, the cohesiveness of this group could not help being stronger than any others. Thus, President Putin could gain much more stable support from the new power elites than his predecessor (Way 2005). Although Putin also used the strategy of ‘divide and rule’ and consequently the potential of power struggles between the liberal technocrats and *siloviki* was constantly inherent under his control,³³ his strategy was distinguished from Yel’tsin’s personnel tactic of ‘divide and rule,’ mixed with the ‘advance, dismiss, and rule,’ only to preserve his patriarchal authority.

In particular, the Western media and scholars were deeply worried about the *siloviki*’s anti-Western and statist tendencies, and further understood that their ideology and political line would have the most direct influence on Putin’s authoritarian moves (Bremmer and Charap 2006-7; Hashim 2005; Holmes 2006; Lee 2010; Shevtsova 2004). As is well known, the *siloviki* actually played a dominant role, with the prosecution service under Prosecutor General Ustinov, in the process of downfall of Mikhail Khodorkovskii and his oil giant, Yukos. Moreover, in later 2004, after the dissolution of Yukos, this group could eventually seize control over its largest production subsidiary, Yuganskneftegaz, although there was competition for taking over this company between Rosneft, led by Sechin, and Gazprom, led by Miller (Bremmer and Charap 2006-7: 88; Kryshtanovskaya and White 2005: 1072). Therefore, it could be said that the *siloviki* had been the most powerful clique, directly connected to the authoritarian moves of the Kremlin within the Putin regime, at least until the beginning of his second term. In addition, a number of former officers of the power

³³ However, the liberal technocrats and *siloviki* could not be strictly distinguished, considering that both clans were included in President Putin’s faction (Kryshtanovskaya and White 2005: 1069). For example, Surkov was generally regarded as belonging to the former group, but made a commitment to the theoretical justification of Putin’s authoritarian moves via his new conception, ‘sovereign democracy,’ and led the hegemonic party, United Russia. Moreover, as examined below, the Chief of the Federal Narcotics Control Service (FSKN) Viktor Cherkosov was at first recognised as one of the *siloviki* but later made an alliance with Medvedev.

structures were recruited not only to middle-ranking and low-ranking positions in the federal and local governments, but also to the core positions of the state-run industries in several fields such as energy, defence, banking and so forth, besides the highest-ranking state posts (Åslund 2007: 251-253; Kryshtanovskaya and White 2003). In contrast, the last members of Yel'tsin's 'family' who had worked in Putin's government, such as Prime Minister Mikhail Kas'yanov and the Chief of the Presidential Administration Alexander Voloshin, flabbily left their position, along with Khodorkovskii's downfall. Moreover, the surviving oligarchs such as Roman Abramovich or Oleg Deripaska quickly stood on the side of the Kremlin.

President Putin began to tighten control over the press as well, from the beginning of his tenure, along with Gusinskii and Berezovskii's fall. Since the oligarchs' ownership of the influential TV channels was transferred to Gazprom and another oligarch, Abramovich, no independent TV channel against the president remained. Most newspapers and publishers which had been financially weak were taken over by companies connected to the Kremlin, and their articles and opinions were also censored by the state. In fact, the independent press organisation that survived by 2007 was only a radio channel, *Ekho Moskvy*, under Alexei Venediktov (Åslund 2007: 208-211; Balzer 2003: 203). Already by 2003, Freedom House (2003) lowered the index of the 'press freedom' for Russia. Moreover, Putin sought to seize control also over civil society. For instance, the Kremlin attempted a hierarchical management of civil society, placing the NGOs under the government-controlled peak organisation, Civic Forum (Nikitin and Buchanan 2002). In particular, President Putin not only extracted loyalty from existing civic organisations, by manipulating rewards and punishments for them, but also marginalised the others that went against his authoritarian initiatives (Lipman 2005).

Additionally, before the 2003 State Duma election, the Kremlin launched the project of "inventing the opposition" both to support United Russia and to steal votes from the largest opposition parties, KPRF (Wilson 2006: 331). Accordingly, several small nationalist and left parties could be combined into a new political party, Motherland, led by a famous nationalist, Dmitrii Rogozin, and a popular communist, Sergei Glaz'ev. The Kremlin even instructed the faithful oligarchs to fund this party and TV channels to broadcast in favour of it (Baker and Glasser 2005: 298-300). In the 2003 election, consequently, Motherland performed well, winning as high as 9.1% of total votes. On the other hand, from the very early phase, the LDPR led by Vladimir Zhirinovskii actively took nationalist and populist

rhetoric with its firm loyalty to President Putin. The LDPR could also obtain not a small share of the total votes in the 2003 legislative election. By contrast, the “real” opposition parties were seriously marginalised by the Kremlin. During the 2003 election, the Kremlin viciously attacked communists by deploying tactics such as negative TV broadcasts or threats against pro-communist regional governments and entrepreneurs, and consequently brought about the serious electoral decline of the KPRF (Gel'man 2008: 923-925). In this Duma election, the liberal oppositions, such as Yabloko and the SPS, were also defeated. As the SPS failed to cross the 5% threshold for a legislative seat, its organisational collapse could not be escaped. Yabloko could also not gain more than 5% of total votes, though it had tried to close the distance between itself and the Kremlin after the downfall of its main sponsor, Khodorkovskii (Gel'man 2005: 237-240). In this political environment, the ruling party, United Russia, could obtain 37.6% of the entire votes and correspondingly occupy more than two thirds of all the seats of the State Duma.

In short, President Putin built the political and institutional foundations for an electoral authoritarian regime, along with the start of his second term in May 2004. Thus, in reality, political competition was *de facto* eliminated in Russia. Nonetheless, Putin still enjoyed high public support, which was undeniably due to the then rapid economic recovery caused by the sharp rise of global oil prices (*The Guardian* 6 June 2007). The circumstance in which Putin established the electoral authoritarian regime exactly corresponded with the argument that if a regime enjoys short-term economic growth but represses ‘coordination goods,’ such as the rule of law or press freedom, it can raise its chance of survival (Bueno de Mesquita and Downs 2005). Accordingly, the conditions for high political competition between the incumbent regime and opposition forces were no longer present, at the time when Putin's second term started. However, Putin still sought the abuse of the civil-law prosecution service, to consolidate his personal power or to manipulate power struggles among the elite groups within his authoritarian regime.

6. 2. 2. The politicisation of criminal justice and major reform of the prosecution service under the electoral authoritarian regime

While President Putin's regime rapidly transformed into an electoral authoritarian one by the beginning of his second term, the prosecution service still remained the strongest power organ, available for the politicisation of criminal justice, in Russia. Even though there was no more political opposition against Putin, the effective value of the prosecution service as

a useable political instrument was not totally removed, as provided by the framework in Chapter II. The president could abuse the prosecutors' enormous power, either to build a complete dictatorship, or to sustain his personal authority by manipulating the balance of power among the different groups under his soft authoritarian regime. On the other hand, President Putin not only perceived his long-term interest, but also had a will for reform of the prosecution service from his early period, as demonstrated by some changes in the Criminal Procedure Code enacted in 2001. Nonetheless, he had consistently minimised the scope of reform against prosecutors, facing their voice, but rather misused them to destroy his political opponents during the entire of his first term. Furthermore, it seemed clear that the president was still more strongly tempted by his short-term interest in utilising the civil-law prosecutors, than by his long-term interest, at least until June 2006, considering the 'Three Whales (Tri Kita)' affair which is examined below.

The power struggle within the president's circle and the prosecution service
(May 2004 - December 2006)

One of the biggest political scandals in President Putin's terms, the 'Three Whales' affair, which surfaced repeatedly throughout his entire tenure, had quite a long history. Indeed, this affair began as some armed and masked officers of the State Customs Committee (the previous title of the Federal Customs Service: FCS) brought an investigation into a large furniture store, Three Whales, in August 2000 (*The Moscow Times* 26 August 2000). This store and its owner, Sergei Zuyev, were investigated on the charges of importation of contraband furniture and non-payment of customs equal to USD 5 million. At the similar time, the MVD also initiated a criminal investigation into this corruption case. Then, Pavel Zaytsev, a police investigator of the MVD who took the investigatory role on this criminal case, disclosed that this case was not a simple smuggling case but was connected to the laundering of hundreds of million dollars and illegal trade in oil and weapons by several high-ranking state officials. However, a more critical problem was that the FSB had been involved in these crimes. When the 'Three Whales' affair broke, not only the head of security team for this furniture store was a former KGB General Yevgenii Zaostrovtssev, but also his son, Yurii Zaostrovtssev, was the deputy chief of the FSB responsible for economic security. Most significantly, the Chief of the FSB Patrushev had not only been a henchman of the father Zaostrovtssev, but was also the present patron of the son Zaostrovtssev (Burger and Holland 2008: 172; Yasmann 2006b). Therefore, the brave police officer's "reckless" criminal investigation could be understood as targeting the new president's faction squarely, and consequently Putin was bound to have a strong incentive to prevent the investigation

from progressing further.

Unsurprisingly, prosecutors stopped this criminal investigation, through its original power to dominate the investigative phase over criminal procedure, by ordering the MVD to transfer the case to their own organisation in November 2000. Moreover, the prosecution service not only opened criminal proceedings against Zaytsev for unlawful conducts during his investigation,³⁴ but also indicted two senior officers of the State Customs Committee, Marat Faizulin and Alexander Volkov, on charge of the abuse of their office, in December 2000. Finally, the Federal Prosecutor's Office terminated the 'Three Whales' case in May 2001 (*Izvestiya* 15 June 2006). Afterwards, prosecutors had not reopened this criminal case again for some time, even though doubtful points still remained in the case, and Yuri Shchekochikhin, who held both a seat in the State Duma and a job as journalist in the independent newspaper *Novaya Gazeta*, mysteriously died only one month after his muckraking article on the 'Three Whales' affair in 2003 (Taylor 2011: 173-174).³⁵ The politicisation of criminal justice regarding this political scandal could be considered the civil-law prosecutors' typical behaviour in serving an incumbent president in the middle of his tenure, in accordance with Hypothesis I-1. On the other hand, however, such a political attitude of the prosecution service could be understood also as a behaviour to defend the interest of *siloviki* the power organ supported at that time – considering that Prosecutor General Ustinov was attached to the *siloviki*, as noted above –, though real power struggles had not yet occurred.

However, the power configuration among the cliques within the president's faction was subtly altered, when Ustinov resigned from the position of prosecutor general, who had consistently displayed partisan behaviour in favour of President Putin and the *siloviki*, but the Minister of Justice Chaika occupied this post in June 2006, after Putin established the electoral authoritarian regime. That is, the *siloviki* who had been recognised as the most influential group could not help losing a considerable part of their power, while the liberal technocrats who had been evaluated as holding somewhat less power than the *siloviki* were able to quickly enhance their influence equal to or over their rival group's, given that the

³⁴ After the prosecutors' indictment, Zaytsev was eventually sentenced to two years' imprisonment in 2003. However, Ol'ga Kudeshkina, the judge who had participated in the trial for Zayvtsev, revealed that her superior Ol'ga Yegorova had pressured her to find the investigative officer guilty, and she had eventually been dismissed from the judiciary just because she had resisted the political pressure (*The Times* 19 March 2005: 52).

³⁵ For Shchekochikhin's famous article about the 'Three Whales' case, see *Novaya Gazeta* (2 June 2003: 1-2).

prosecution service still played the most dominant role, among law enforcement agencies, in criminal proceedings. The corridors of power within the Kremlin were also regarded as moving from Sechin, who had the matrimonial relation with Ustinov, to Medvedev, albeit under Putin's control (Parsons 2006; Yasmann 2006a). Right after this alteration of power configuration, the new Prosecutor General Chaika squarely targeted the *silioviki*, reopening the 'Three Whales' case. As a result, numerous high-ranking officers in power structures were fired by the reason of being involved in this affair. To begin with, several high rankers in the Central and Moscow Province Administration of the FSB were dismissed while Patrushev was on vacation. Since the *siloviki* clique *de facto* had their origin in the FSB, the personnel lustration was able to undermine this clan. Moreover, five senior officers of the FCS and even some high-ranking prosecutors in the Federal Prosecutor's Office, who had been associated with the investigation into the 'Three Whales' case, were relieved of their position. In addition, President Putin replaced his advisors on personnel matters of security and law enforcement agencies in the presidential administration (*Izvestiya* 14 September 2006: 2).³⁶ Then a notable point was that the prosecution service brought no criminal proceeding against high-ranking state officials, but only charged five from business people, including Zuyev, the owner of Three Whales Furniture. Therefore, these partisan decisions of the prosecution service could be analysed as undoubtedly according with Putin's intentions to weaken the political influence of the *siloviki*, under his semi-authoritarian regime, as well as to protect state officials from any judicial punishment (Burger and Holland 2008: 173; Taylor 2011: 174; Yasmann 2006b).

In short, President Putin enjoyed the abuse of the civil-law prosecutors' enormous power over criminal procedure, especially in manipulating the power configuration among the groups of power elites, according to his preference, through the provocation of clique battle, at least during early two years of his second term, under the electoral authoritarian regime. However, he finally began to pursue the actualisation of his long-term interest in reform against the civil-law prosecution service, after the end of the long 'Three Whales' case and the achievement of balance of power he had aimed at, rather than his short-term interest.

³⁶ As a result of this clique battle, Medvedev could eventually obtain the presidency in December 2007. Nonetheless, as expected, the *siloviki* could also sustain a significant part of power as one of the major clan, while Prime Minister Putin was consistently wielding the supreme political influence, under the electoral authoritarian regime.

President Putin's major reform of the prosecution service and the creation of the 'investigative committee' (January 2007 - November 2007)

As mentioned above, President Putin had more obvious reasons to be active in reform of the prosecution service than Yel'tsin. His educational background as a law student under Anatolii Sobchak, and his principle of the 'dictatorship of law' were apparent causes to make him hasten to enact the Criminal Procedure Code at the beginning of his first term. But the president narrowed the scope of reform against civil-law prosecutors and made a very limited code, facing their voice, and at the same time he could destroy his political enemies, extracting loyalty from the prosecutors and abusing their massive power, during his first term. Although Putin finally established an electoral authoritarian regime at the beginning of his second term, he continued to abuse the massive power of the prosecution service, in manipulating the balance of power among the cliques within his faction for a fairly long time. However, the semi-authoritarian president still recognised his long-term interest in reform of the prosecution service, which had not been actively pursued owing to the short-term interest for his own political ambition. For instance, according to a comment on Putin's view about power structures in his second term, from Moscow-based political analyst, Dmitrii Oreshkin, "Even though Putin is himself a *silovik* by background, he understands the dangers in concentrating power and resources in the hands of any law enforcement or security structure" (Whitmore 2007). This meant that he clearly recognised the necessity of weakening the prosecution service, the strongest agency among the power apparatuses in Russia. Furthermore, the president could have a stronger incentive than ever, since the power configuration among the cliques had already been rearranged to serve his preference. In this context, after all, President Putin launched major reform against the prosecution service.

The plan of large-scale reform of the prosecution service was started at the end of 2006 (Zvyagintsev 2012: 397). In March 2007, the State Duma was also told about a rumour that President Putin was preparing a bill for major reform of the prosecution service, by which an 'investigative committee' would be created, and consequently the division of functions between the investigators and prosecutors would be brought (Ershov 2010: 9; Sakwa 2011: 191). In fact, this reform plan of Putin was not unfamiliar, considering that there had been several attempts to build an independent investigative body from the prosecution service, in Russia. But the real problem was that this sort of reform had never been successful.³⁷

³⁷ The controversy over the creation of an independent body from the prosecution service, which assumes full charge of criminal investigation, had its own long history. As discussed previously, some reformers had

Nonetheless, the bill for the amendment of the Criminal Procedure Code and the Federal Law on the Prosecutor's Office President Putin was preparing aimed, not only to establish an autonomous investigative agency, allowing the investigators of this new body to carry out a criminal investigation without the control of prosecutors, but also to isolate the latter totally from the investigative phase. Hence, this legislation was much more radical, when compared with several similar bills after democratisation, as it would be able to dissolve the mixture of two functions of investigation and indictment for civil-law prosecutors and transform the centralised criminal procedure into the decentralised one of a common-law prosecution system. The content and implications of this legal amendment are examined below.

On the other side, at first, the prosecution service seemed not so serious about the creation of this new investigative agency. In a meeting with journalists, Prosecutor General Yurii Chaika even declared his support for the establishment of the new body, saying that the new 'investigative committee' would unite various investigative agencies attached to the MVD, the FSB, and so on, but prosecutors would be able to take over any criminal case which they prefer to investigate by themselves from the other law enforcement agencies (*Vremya Novostei* 17 January 2007). This demonstrated that prosecutors were so optimistic in protecting their prerogative powers, as always, in the process of this reform. However, since the fact in which the prosecution service would be stripped of all of its domination over the law enforcement agencies including the new committee itself, due to this legal revision, during investigations became known, the prosecutors' confidence was bound to sharply decline. Prosecutors began to criticise the reform agenda, raising the issue of its legality. For example, before the Federal Council confirmation, Deputy Prosecutor General Sabir Kekhlerov emphasised that the legislation violated the constitution ruling the 'single centralised system' of the prosecution service (*Vremya Novostei* 7 June 2007: 1). Moreover, Prosecutor General Chaika stressed that the reform bill was not only unconstitutional but also contrary to international norms, including the relevant resolutions of the Council of

tried to make such a separate investigative agency, but had failed. For example, there was the first attempt to build the investigative agency in 1990, and even a draft bill for its foundation was presented to the legislature in 1993, but could not be passed because of the dissolution of the Supreme Soviet in the vortex of the constitutional crisis (Bowring 2013b: 9). Both before and after the birth of the constitution in December 1993, the prosecutors had been able to delay the foundation of this investigative agency effectively and indefinitely, under the consistent conflicts between the presidents and their oppositions. That is to say, the creation of the investigative agency, separated from the prosecution service, had repeatedly failed, while no major reform to curtail the civil-law prosecutors' massive power could be consistently pushed, even in quite disadvantageous situations for them, during President Yel'tsin's two terms and most of Putin's tenure. On the other hand, also in South Korea after democratisation, no president succeeded in establishing this type of investigative agency, as explained in Chapter IV.

Europe, though this criticism was widely considered the prosecutors' pretexts to protect their role, position and power in the criminal justice system (Greenberg 2009: 23-24).

However, a critical point in comparative perspective is that the president did not succumb to such a voice of the prosecution service, and prosecutors were also unable to make an organisational resistance, based on their collective action, against him in this case. The prosecution service had defeated all the reform programmes against it in Russia after democratisation, as in South Korea, via its voice or organisational resistance. By contrast, prosecutors could not counterattack against this reform programme, although the extent of it was much stronger than the previous ones. This can be analysed as that the prosecution service could not threaten the president's faction and Putin did also no longer recognise the power apparatus as a threat, because it was *de facto* impossible that prosecutors would deal a political blow to the president, even if they would have brought criminal proceedings against some members of his circle, in the situation where all the opposition forces which would gain the reflection benefits had already been eliminated under the semi-authoritarian regime. That is to say, the civil-law prosecutors were not sustaining a political opportunity structure enabling them to resist a reformist president effectively, in spite of their wide arbitrary power in criminal proceedings, in accordance with Hypothesis III of this thesis.

In addition, almost no political force or ministry remained on the side of the prosecution service within the regime. The investigative agencies, such as the police in the MVD or the FSB had no reason to oppose this reform plan. In fact, these organs usually could not help but have a deep interest in gaining autonomous investigative power from the prosecution service, in the civil-law prosecution system, although the ostensible reason for them to support this reform bill was that the criminal investigation process itself would become more effective than ever by this reform (*Itar-Tass Daily* 28 May 2007). In actuality, some legislators who had a career in the police played a leading role in drafting this reform bill in the State Duma. More importantly, the FSB which had already suffered significantly by the 'Three Whales' affair right before this legislation launched could be understood to get one more cause to strongly support the reform programme Putin initiated (Burger and Holland 2008: 184). The prosecution service, which could be no longer a political weapon available for the *siloviki* after Ustinov's resignation, was only a burdensome rival to the FSB. On the other hand, as discussed above, the State Duma dominated by United Russia had been prepared to pass all the bills the president aimed at, even including the reform plan against prosecutors, like a "rubber stamp," although a few members requested some

revisions before ratification of the legislation. The KPRF was unanimously against this reform on the grounds that the newly decentralised criminal justice system would bring inefficiency and allow investigators to commit illegal activities, freely from the oversight from prosecutors, in criminal proceedings, but this opposition party was just one of the minor parties with less than 50 legislators in the State Duma (*Kommersant* 28 April 2007; *The Moscow Times* 14 May 2007).³⁸ In other words, the then prosecution service was *de facto* surrounded by enemies on all sides within President Putin's electoral authoritarian regime.

There was one more reason for prosecutors to be unable to tactically block this reform. A noticeable point concerning the design of this reform was that President Putin tried to carefully decouple the investigators' interest from the prosecutors' one, within the prosecution service where the two had shared collective interests until then, by enabling the former to be affiliated with a new 'investigative committee' and to be able to hold independent investigatory power from the latter. In reality, along with the ratification of this reform bill, the 'investigative committee' would not only take over control of about 18,000 investigative officers who were directly employed by the prosecution service, but also exercise jurisdiction over 60,000 criminal cases, including crucial cases, such as the famous journalist Anna Politkovskaya (Whitmore 2007). In South Korea, the investigators belonging to the prosecution service usually equated their own interest with the prosecutors' one, since the inter-organisational crash between the prosecution service and police agency was always a main axis of conflicts in the debate over the redistribution of investigative powers over criminal procedure, as showed in Chapter IV. Hence, prosecutors could have little difficulty in judicialising politics, relying upon their own investigative personnel, without help from police officers, when they tried to defeat any reform plan against them. In Russia, by contrast, the main purpose of this reform programme Putin pushed for was that even the investigative officers belonging to the prosecution service would be no longer controlled, during investigation phase, by prosecutors. As a result, prosecutors could not help but have an additional difficulty in making an organisational resistance against the

³⁸ The reason why the communists strongly opposed this reform plan was understandable, also given Blank's analysis (2008: 251) in which the president would be able to choose his loyalist for the chairman of the 'investigative committee,' and hence his control over criminal investigation would be strengthened. Moreover, as mentioned above, they might be naturally reluctant to change the Soviet-style criminal procedure in an ideological manner. Nonetheless, the communists' opposition to this reform bill could not be assessed as a rational choice, because this would decentralise the criminal justice system and consequently make an incumbent president also have more difficulty in judicialising politics via the prosecution system than previously, as in common-law countries. Such reformative effect of these changes is explained below. At any rate, the KPRF could be regarded as suspecting President Putin's political intention almost blindly at that time, as with the Grand National Party's opposition to President MH's reform in South Korea.

president, in the absence of any practical assistance from the investigators.

As a consequence, the legislature passed the Federal Law on Adopting Changes in the Criminal Procedure Code and in the Federal Law on the Prosecutor's Office, with no difference from the first draft, in May, and the president finally signed this law in June 2007. The process from the circulation of the draft bill to the enactment of this radical law was short and speedy, which surprised both the Russian media and Western society (Ershov 2010: 9). In sum, Putin initiated large-scale reform of the civil-law prosecution service, after fully exploiting the power agency in establishing the semi-authoritarian regime and in manipulating the power struggle among the cliques within his faction. Prosecutors were so dissatisfied with the reform bill, as always, but could not defeat this plan through their organisational resistance, in the absence of political competition, differently from any other times when reforms against them had been launched. In accordance with Hypothesis III of this thesis, President Putin succeeded in achieving major reform of the prosecution service, by establishing the 'investigative committee,' under the electoral authoritarian regime, in his second term. The next part accounts for the content and political implications of this institutional reform.

6. 2. 3. The content and political implications of President Putin's institutional reform of the prosecution service

The most important points of the amended Criminal Procedure Code and Federal Law on the Prosecutor's Office,³⁹ regarding reform of the prosecution service, were as follows: (i) the 'investigative committee' as a new investigatory agency was eventually created within the prosecution service; and (ii) prosecutors were *de facto* deprived of almost all the prior rights to control a criminal investigation in the pre-trial stages. Specifically, first of all, the 'investigative committee' took away most of the power, which prosecutors had exercised, during a criminal investigation. According to the amended Criminal Procedure Code, the 'investigative committee' has the ultimate control over most of the criminal investigations into serious offences which the prosecution service's own investigators had conducted under the control of prosecutors (Article 151). Concerning the status of the 'investigative committee,' according to the revised Federal Law on the Prosecutor's Office, the chairman of the committee, as the first deputy prosecutor general, can be appointed and dismissed by

³⁹ For the full text of this legal revision, refer to Federal'nyi Zakon RF o vnesenii izmenenii v ugolovno-protsessual'nyi kodeks RF i v federal'nyi zakon o prokurature Rossiiskoi Federatsii (5 June 2007).

an incumbent president with the approval of the upper house, Federal Council. In particular, the chairman holds full jurisdiction over the financial as well as personnel affairs in the ‘investigative committee’ (Article 20.1). Therefore, the new investigative agency could be recognised as an almost independent body from the prosecution service, although the former is still officially subject to the latter in the organisational form.

<Table 6-3> Content of Reform of the Prosecution Service in President Putin’s Second Term (June 2007)

| Driving force | The Contents of Reform against Prosecutors | Result |
|--------------------------------------|--|---------|
| President Putin and United Russia | <ul style="list-style-type: none"> ◦ the creation of the ‘investigative committee’ which holds the ultimate control over most of the criminal investigations into serious offences which the prosecution service’s own investigators had conducted under the control of prosecutors ◦ the restriction of the prosecutors’ initiation of criminal proceedings ◦ the restriction of the prosecutors’ own control over the investigation of criminal offences, except for cases connected to public security ◦ the exemption of the obligation for investigators to report the progress of criminal cases to prosecutors ◦ the transfer the right to petition courts for the investigators’ pre-trial coercive measures, such as detention, search and so forth, from prosecutors to the heads of investigative bodies ◦ the restriction of the prosecutors’ termination of a criminal case by themselves. <p>→ the amendment of the Criminal Procedure Code</p> <ul style="list-style-type: none"> ◦ the appointment and resignation of the chairman of the ‘investigative committee’ by an incumbent president with the consent of the Federal Council <p>→ the revision of the Federal Law on the Prosecutor’s Office</p> | success |

On the other hand, regarding the prosecutors’ rights to investigate a criminal case, they lost their exclusive power to initiate criminal proceedings, according to the amended Criminal Procedure Code. The prosecutors’ power to decide the opening of a criminal investigation was restricted only to the right to refuse the opening within 24 hours after receiving the investigator’s resolution of the initiation of the criminal proceeding (Article 144). Yet, even a refusal can be issued only on the grounds that the initiation of a criminal investigation is not fully supported by evidence or involves the investigator’s illegal procedural activities. No extension of the 24 hours’ period for the check can be allowed for the prosecutors (Article 146). More importantly, prosecutors could no longer control the phase of criminal investigations. They were prevented from overseeing the investigation of criminal offences, except for the cases connected to public security. Hence, the prosecutors can no longer control the overall direction of criminal proceedings operated by investigators (Article 38). Investigators also have no obligation to report the progress of criminal cases to prosecutors.

Moreover, the prosecutors' right to petition courts for the investigators' pre-trial coercive measures, such as detention, search and so on, was transferred to the heads of investigative bodies, also including the chairman of the new 'investigative committee,' within the law enforcement agencies such as the FSB, the MVD, and the prosecution service itself. In addition, prosecutors cannot decide to terminate criminal proceedings by themselves, but only suggest an objection against the termination of criminal cases to the heads of the investigative bodies, in all criminal cases except for the offences connected to public security. Furthermore, if even the prosecutors' refusal against the close of the criminal cases is not accepted by the heads of the investigative bodies, the criminal proceedings cannot be reopened (Article 214).

Due to the above legal changes with the reform, Russian prosecutors lost almost all of their prerogatives in the investigatory phase. They maintained only the power to indict criminal suspects to trials, as in common-law countries where, in principle, prosecutors hold neither the right to close a criminal case at his disposal, nor the power to direct the police officers during investigations, but only declare either the indictment or non-indictment on pre-investigated cases. Rather, the prosecutors' power to indict criminal suspects could also be understood to become somewhat weaker than the common-law prosecutors' power, after the Putin reform in June 2007. For instance, even when a prosecutor rejects to indict a criminal suspect for a trial, the investigators can petition their own head for the appeal against the prosecutor general, according to the revised Criminal Procedure Code (Article 221).

This reform could be considered very radical, in the history of democratised Russia, in the respect that it significantly curtailed the prosecutors' enormously wide power over criminal procedure, depriving them of the investigative power. Russian prosecutors could no longer be regarded as civil-law prosecutors but as common-law prosecutors. In particular, it was clear that this institutional change would be able to increase the potential of establishment of the rule of law, because it dissolved the combination of presidentialism and the civil-law prosecution system as the institutional factor which caused the politicisation of criminal justice in various patterns. On the other side, the result of this reform had some limits as well, in the respect that prosecutors totally lost the power of investigation into criminal suspects whereas investigators, especially in the 'investigative committee,' were allowed to

have a little influence also on the indictment of criminal suspects.⁴⁰ This means that the investigators, instead of prosecutors, became able to exercise some discretion over criminal procedure, although the former's current power was less arbitrary than the latter's previous power. In addition, the chairman of the 'investigative committee' would be encouraged to be loyal only to an incumbent president during most of his tenure. This is why Blank (2008: 251) worried that the 'investigative committee' would be able to take away a considerable part of the prosecutors' power in criminal proceedings, while being more directly subject to the president than them.⁴¹

Nonetheless, it cannot be denied that this reform lowered the risk of the politicisation of criminal justice, dividing between the functions of investigation and indictment in criminal proceedings. Hence, even an incumbent president had to not only generate an informal cooperation between the prosecution service and the investigatory agencies such as the 'investigative committee,' but also extract loyalty from the two bodies concurrently. Putin might be able to control criminal proceedings, for a while, under his electoral authoritarian regime.⁴² But some circumstances of conflict between the prosecution service and the 'investigative committee' have already been reported (Bowring 2013b; Burger and Holland 2008: 185-190). Most of all, the criminal proceedings involving major politicians became slower and less effective than the previous cases of the president's political enemies, such as Khodorkovskii's punishment (Sakwa 2011: 192-193). For instance, neither the Head of the Operations Support Department at the FSKN Alexander Bulbov nor the Deputy Minister of Finance Sergei Storchak could be sent to trials, about two years after their arrest, in the newly decentralised criminal procedure, whereas Khodorkovskii was arrested, indicted, and even sentenced, within a year and half, in the previous centralised criminal justice system (Ershov 2010: 15-16). In sum, President Putin's large-scale reform of the civil-law prosecution service apparently reduced the danger of the politicisation of criminal justice, though this was still invisible due to the image of semi-authoritarianism, in Russia.

⁴⁰ In a similar context, a young lawyer who is working in Nizhnii Novgorod, requesting anonymity, also stated that investigators may arbitrarily cover up criminal cases, free from the control of prosecutors, after this reform, in an written interview with me (10 December 2013). As discussed previously, this risk can be brought, unless the 'checks and balances' among investigative agencies are ensured.

⁴¹ Actually, Aleksander Bastrykin, a former university class mate of President Putin, was appointed as the first chairman of the 'investigative committee.' Thus, some critics including Blank (2008) could be said to have good grounds for fearing that the new investigative body would be strongly loyal to an incumbent president, at least during Putin's term.

⁴² The young lawyer working in Nizhnii Novgorod, interviewed by me (10 December 2013), also pointed out that in Russia, the fairness of criminal proceedings cannot easily be achieved because all the judicial bodies such as courts and other law enforcement agencies were still subordinate to the current government, although the criminal procedure was decentralised by the reform in June 2007.

6. 3. Summary

This chapter has sought to explain why major reform to curtail the prosecutors' extensive power over criminal procedure could hardly be tried, or only minor changes to their power bases could be launched and achieved, as well as why a president could exceptionally succeed in reform against them, under the institutional combination of presidentialism and a civil-law prosecution system. The first part, in which large-scale reform could hardly be attempted, was explained through the empirical analysis of some cases during President Yel'tsin's period and President Putin's first term. This was to verify Hypothesis I-2 of this thesis: if political competition is high and an incumbent president seeks to abuse the civil-law prosecutors' enormous power, any major reform plan against the prosecution service would be suspended. The second part, in which a president can exceptionally succeed in large-scale reform of the civil-law prosecution service, was confirmed via the empirical analysis of a case during President Putin's second term. This was to verify Hypothesis III of this thesis: if political competition is eliminated, civil-law prosecutors can neither defect against an incumbent president through their betrayal in his last phase, nor through their organisational resistance.

At first President Yel'tsin did not strongly oppose reform against the civil-law prosecution service, allowing his reformists to push ahead with it, during democratisation. However, since Yel'tsin had faced a slight resistance from prosecutors, he became utterly inactive. Therefore, they could succeed in blocking major changes against their collective interest, in spite of the favourable social mood for the reform, right after the breakdown of the communist system. Moreover, before and after the enactment of the 1993 Constitution, prosecutors enforced Yel'tsin, whose reformists were attempting reform of the prosecution service, to realise its utility obviously and abandon even his uncertain will for the reform, in the circumstance of violent conflicts between the president and legislature. Even some backslidings in reform of the prosecution service appeared in President Yel'tsin's tenure. President Putin had a stronger will for prosecution service reform, than his predecessor, at the beginning of his first term. However, since he was once tempted to abuse the civil-law prosecutors' enormous power, and further encountered their voice against his reform, his will was also undermined. Therefore, President Putin could not help but fulfill most of the prosecutors' interest and gain only a little concession, by enacting the Criminal Procedure Code with no radical change, during his first term. That is, the empirical cases in President

Yel'tsin's two terms and Putin's first term generally verified Hypothesis I-2 of this thesis, like the cases in South Korean President YS's and DJ's periods.

On the other hand, an electoral authoritarian regime was established, and the conditions for high political competition between the president and the opposition forces were no longer sustained, as President Putin's second term began, in Russia. After fully exploiting the prosecution service in building the electoral authoritarian regime and in manipulating the balance of power among the cliques within his faction, Putin eventually initiated large-scale reform against the power agency which he had put off. Prosecutors showed a serious dissatisfaction with the reform bill, as always, but could not defeat this plan, through their organisational resistance, in the absence of political competition. In June 2007, President Putin finally succeeded in achieving major reform of the prosecution service, by creating the new 'investigative committee,' under the semi-authoritarian regime. The empirical case in President Putin's second term exactly confirmed Hypothesis III of this thesis.

Chapter VII: Conclusion

The relationship between the rule of law and democracy is quite subtle, because the two values are not only embodied through their own institutional mechanism but there is also an essential tension between them (Ferejohn and Pasquino 2003: 243; Sejersted 1988). Thus, the judicialisation of politics or the politicisation of justice cannot be totally avoided, though it can be regulated within a balance between democracy and the rule of law. But a balance between the two values can be seriously upset, which may intensify the danger of the judicialisation of politics, if the institutional interactions between electoral branches and judicial bodies are not appropriately arranged. While the rule of law could sometimes encroach on democracy, in the name of judicial supremacy, in a number of countries, democracy could also often damage the rule of law, because of the judiciary which is still improperly subject to an incumbent government, mostly in several new democracies. In both cases, as a consequence, both the rule of law and democracy could not help but be undermined.

On the other hand, both in developed and emerging democratic countries, judicial officers have increasingly brought judicial activism, since they recently gained more independence from the political branches but assumed less democratic accountability than previously (Tate and Valinder 1995). Then, more and more individuals and groups have relied on the judges or prosecutors, rather than to mobilise public mass supports, in order to defeat their political oppositions. If so, the judicial officers, unaccountable to any other branches of government, may make a partisan decision in favour of a particular political or social force, seeking their own ideational or material interests. Consequently, they are likely to distort democratic processes seriously. This is why a world-wide concern about constitutional or judicial review has also been brought. In actuality, the supreme or constitutional court has rapidly arisen as one of influential policy-makers or even the national arbiter, all over the world.

More importantly, concerning the main theme of this research, a political or social force

may attempt to stigmatise its political opponents as immoral or even criminals, through the political manipulation of a criminal proceeding, by forming an alliance with judges or prosecutors. Here, it is required to focus more on prosecutors taking a pre-emptive action in criminal proceedings, than judges making a decision only after the indictment. However, common-law prosecutors, who generally exercise only the right to indict a criminal suspect for a trial in the decentralised criminal justice system, could seldom display a partisan behaviour. In contrast, civil-law prosecutors, who hold the power to investigate as well as to indict a criminal suspect over the centralised criminal procedure, could intensify the danger of the politicisation of criminal justice. Thus, it may be lucky that prosecutors are still hierarchically accountable to an incumbent government in most civil-law countries. Also in practice, as the democrats expect, in the continental European countries where the tradition of parliamentary supremacy is strong, civil-law prosecutors have not often been involved in the politicisation of criminal justice, in spite of their far-reaching power over criminal procedure. As noted above, even in new democracies, if the countries adopted a consensus form of government such as dual executive system or parliamentarism, civil-law prosecutors have exercised their broad power in a relatively impartial manner. Chapter II explained such institutional equilibriums of a common-law prosecution system and the combination of a civil-law prosecution system and consensus form of government, though these parts did not accompany deep empirical case studies. By contrast, in the majority of young democracies where presidentialism was introduced along with the Third Wave of democratisation, civil-law prosecutors are still loyal to an incumbent president, and often manipulate criminal proceedings in favour of his faction. In fact, this collusion of the two actors coincides with the liberals' concern, which is easily predictable.

However, a more notable point is that civil-law prosecutors sometimes defect against an incumbent president. To begin with, civil-law prosecutors who have served an incumbent president during most of his tenure tend to betray him when his tenure is ending. In particular, high-ranking prosecutors can strategically betray the president, for their career development under a next presidency, along with the presidential electoral cycles. This pattern of the interaction between an incumbent president and civil-law prosecutors could be repeatedly formed, as political power is not only concentrated on a person for a fixed time, but the continuity between an outgoing and incoming government is also much weak, under presidentialism rather than under a consensus form of government. Therefore, this study aimed to generalise this pattern of the interaction between the two main political actors in such young democracies that have the institutional combination of a civil-law

prosecution system and presidentialism, with the new institutionalist approach.

On the other hand, civil-law prosecutors can go against an incumbent president, also when he attempts reform against their collective interests such as their great prerogative, in order to protect the interests. Certainly, in the majority of cases, the president would voluntarily suspend large-scale reform of the civil-law prosecution service before long, to circumvent a conflict with it. However, if a president does not abandon the reform, the prosecutors would make an organisational resistance, based on their collective action, against him, which can be a stronger defection than their betrayal following the high rankers' strategic choice in the last phase of his tenure. Given the prosecutors' great arbitrary power over criminal procedure, the president's reform is likely to fail. As this pattern of the interaction between the two main political actors could also be brought, although the frequency is much less than the first pattern, in the new democracies with the institutional combination of a civil-law prosecution system and presidentialism, it was included as the generalisable second pattern in this research.

However, civil-law prosecutors may abandon to make an organisational resistance against an incumbent president, even when he launches major reform against their collective interests, in the absence of political competition. As explained previously, the prosecutors who would not make an organisational resistance against the president have no incentive to betray him in his last phase as well. Consequently, the president can exceptionally succeed in the reform. As this pattern of the interaction between the two main political actors can also be formed, even though such a case is exceptional, in the emerging democracies with the institutional combination of a civil-law prosecution system and presidentialism, it was included as the generalisable third pattern in this research.

Given the above observations, this research suggested a few hypotheses; i) if political competition is high and an incumbent president seeks to abuse the civil-law prosecutors' extensive power, they would serve the president but betray him in the last phase of his tenure (Hypothesis I-1), and any major reform programme against the prosecution service would be suspended (Hypothesis I-2); ii) if political competition is high and an incumbent president pushes ahead with large-scale reform against a civil-law prosecution service, the prosecutors would make an organisational resistance against him and consequently his reform would fail (Hypothesis II); and iii) if political competition is eliminated, civil-law prosecutors would neither defect against an incumbent president through their betrayal in

his last phase, nor through their organisational resistance when he attempts major reform against them (Hypothesis III). Correspondingly, these hypotheses were empirically tested across Chapter III, IV, V, and VI of this thesis.

In Chapter III, Hypothesis I-1 of this thesis was verified through the empirical analysis of relevant cases during South Korean President Yong-sam Kim (YS)'s and Dae-jung Kim (DJ)'s periods. In South Korea after democratisation, as the political regionalism deepens the possibility of political conflict caused by a strong presidency, the serious political polarisation between the presidents' faction and the opposition forces has constantly been formed. In this situation, President YS and DJ repeatedly promoted their loyalists to top-ranking prosecutors, and exploited this power apparatus in favour of them but against their political enemies during most of their tenure. However, both of them could not avoid the defection of the prosecution service, and consequently could not prevent prosecutors from indicting their sons in the last phase of their term, in accordance with Hypothesis I-1.

In Chapter IV, Hypothesis I-2 of this thesis was verified through the empirical analysis of relevant cases during South Korean President YS's and DJ's periods, and Hypothesis II was confirmed via the empirical analysis of relevant cases during South Korean President Moo-hyun Roh (MH)'s period. First of all, President YS had no will to reform against prosecutors in his term. By contrast, the opposition parties, such as Democratic Party (DP) or National Congress for New Politics (NCNP), had an incentive to launch reform of the civil-law prosecution service, for preventing the politicisation of criminal justice against them. But the opposition parties, which had almost no control over the prosecutors' careers, were inevitably much more vulnerable to their enormously broad power over criminal procedure than the president, when the prosecutors selectively targeted the reformist forces. As a result, no reform against the prosecution service was achieved during the President YS period. Unlike YS, President DJ attempted to reform against this power organ right after his rise to the presidency. Before long, however, he also neglected his long-term interest in large-scale reform against the civil-law prosecutors but committed to his short-term interest in exploiting them, due to the probability of their defection against him in the situation of judicialised politics, especially via the criminal proceedings of the 'cloth lobby' scandal. President DJ no longer pursued any major reform against the prosecution service. The empirical cases in the two presidents' term generally corresponded with Hypothesis I-2.

In contrast, President MH not only refused to seek the short-term interest in exploiting the civil-law prosecution service from the beginning of his tenure, but also did not abandon his long-term interest in reform against the power agency during his entire tenure, unlike his predecessors. As expected, prosecutors brought a voice and even strong organisational resistance against the president, in order to protect their collective interests. Owing to the corruption scandals, involving key members of his faction, repeatedly disclosed by the prosecutors, President MH who could not help being vulnerable to the politicisation of criminal justice, under the serious political competition, steadily lost his moral legitimacy as well as political influence. Consequently, all of MH's attempts at major reform of the prosecution service failed. The empirical cases during President MH's period are exactly accordance with Hypothesis II.

In Chapter V, Hypothesis I-2 of this thesis was verified through the empirical analysis of relevant cases during Russian President Boris Yel'tsin's period and Vladimir Putin's first term, and Hypothesis III was tested through the empirical analysis of a case during Russian President Putin's second term. In Russia after democratisation, the violent political conflict between the presidents' faction and the opposition forces had been constantly brought, until when Putin built his electoral authoritarian regime, because some transitional factors for a serious political conflict were combined with the strong presidency. In this situation, corresponding with Hypothesis I-1, President Yel'tsin attempted to advance his loyalists to the top-ranking posts of the prosecution service, and exploited the power organ to destroy his political opponents through the politicisation of criminal justice, during most of his tenure, but faced its defection, like the South Korean Presidents. President Putin also often exploited the power agency through his loyal top-ranking prosecutors during his first term but could avoid their betrayal even in the last phase of his tenure, because the political competition was eliminated in the beginning of his second term. Then, the prosecutors might have been unable to betray Putin, since they already lose their far-reaching power over criminal procedure in June 2007. However, it is logical to assume that the prosecutors would not defect against President Putin in the last phase of his second term, for their career development under the next president, in the absence of political competition, even though they had preserved their previous enormous power.

In Chapter VI, Hypothesis I-2 of this thesis was verified through the empirical analysis of relevant cases during Russian President Yel'tsin's period and President Putin's first term, and Hypothesis III was confirmed through the analysis of an empirical case during Russian

President Putin's second term. At first President Yel'tsin did not strongly oppose reform against the civil-law prosecution service, allowing his reformists to push ahead with it, during democratisation. However, since Yel'tsin had encountered slight resistances from prosecutors, he became so inactive. Hence, they could succeed in blocking major changes against their collective interests, despite the favourable social mood for the reform, right after the breakdown of the communist system. Also, before and after the enactment of the 1993 Constitution, prosecutors enforced Yel'tsin, whose reformists were launching reform against the prosecution service, to realise its utility clearly and abandon even his uncertain will for the reform, in the circumstance of violent conflicts between the president and legislature. Even some backslidings in reform of the prosecution service were taken during President Yel'tsin's two terms. President Putin had a stronger will for reform against the prosecution service, than his predecessor, at the beginning of his first term. However, since he was once tempted to abuse the civil-law prosecutors' enormous power, and further faced their voice against his reform, his will also declined. Therefore, President Putin could not help but fulfill most of the prosecutors' interests and gain only a little concession from them, by enacting the Criminal Procedure Code with no radical change, in his first term. That is, the empirical cases during President Yel'tsin's two terms and Putin's first term, as the cases in South Korean President YS's and DJ's periods, generally corresponded with Hypothesis I-2.

On the other hand, an electoral authoritarian regime was established, and the conditions for high political competition between the president and the opposition forces were no longer sustained, as President Putin's second term began, in Russia. After fully exploiting the prosecution service in building the electoral authoritarian regime and in manipulating the balance of power among the two groups, *siloviki* and the liberal technocrats, within his faction, Putin eventually initiated large-scale reform against the power apparatus which he had put off. Prosecutors showed a serious dissatisfaction with the reform bill, as always, but could not defeat this plan, through their organisational resistance, in the absence of political competition. In June 2007, President Putin finally succeeded in achieving major reform of the prosecution service, by creating the new 'investigative committee,' under his semi-authoritarian regime. The empirical case in President Putin's second term accurately confirmed Hypothesis III.

The above chapters, with the verification of the hypotheses, have three crucial theoretical implications. First, under the institutional combination of presidentialism and a civil-law

prosecution system, prosecutors are unlikely to maintain political neutrality, but to display a partisan behaviour either in favour of, or against, an incumbent government. That is, the institutional factor of combination of a civil-law prosecution system and presidentialism could induce the prosecution service, as a judicial body, to behave differently from the expectations of both the democrats and the liberals. Secondly, the variation of political competition can seldom influence judicial officers accountable to electoral branches to behave independently of politics, but can influence them, particularly the top rankers, to betray an incumbent president in the last phase of his tenure, unlike the prediction from Barzilai (1997) or Chavez, Ferejohn and Weingast (2003). Thirdly, and most significantly, the variation of political competition can influence judicial officers to make their collective action, for protecting their collective interests. In particular, if the judicial officers hold far-reaching power over criminal procedure, as civil-law prosecutors, their organisational resistance against an incumbent president who pushes ahead with reform encroaching on their collective interests, such as prerogative powers, would be threatening enough to make the incumbent abandon the reform plan.

In South Korea, since the termination of President MH's period, the essential of the civil-law prosecution system still has hardly been changed. After Myung-bak Lee obtained the 17th Presidency in December 2007, a serious debate and conflict over the redistribution of investigative powers in criminal proceedings, between the prosecution service and police agency, via a revision of the Criminal Procedure Act occurred once again, no large-scale reform against prosecutors could be achieved also in this case. Police officers acquired their autonomous right to initiate a criminal investigation they had long wished, but the scope of prosecutors' control over them during investigations was rather reinforced (*Seoul Gyeongjae* 27 December 2011). Regarding this change, as Professor Bo-hack Suh assessed in the interview with me (25 June 2013), "the legal amendment could be understood as backsliding in reform of the prosecution service." Instead, prosecutors were criticised as being most seriously politicised during President Myung-bak Lee's period (*Gyeonghyang Sinmun* 23 September 2013). Also after Geun-hye Park's inauguration to the 18th South Korean Presidency in March 2013, any major reform has not yet been accomplished, even though she had strongly promised to reform the prosecution service during her presidential election campaign (*Naeil Sinmun* 5 December 2012). Therefore, prosecutors have a high potential of politicising criminal justice, with a strong partisan position, either in favour of or against an incumbent president, considering that the discordant combination of a civil-law prosecution system and presidentialism is still present in South Korea. Perhaps, the

prosecution service will remain an unsolved problem for quite a long time, in South Korea which has been more highly evaluated in various dimensions of democracy than any other young democratic countries along with the Third Wave of democratisation.

In Russia, on the other hand, the prosecution service was significantly reformed in June 2007, but an electoral authoritarian regime has still been preserved. Even after Dmitrii Medvedev rose to the Russian Presidency in March 2008, Putin could continuously wield the strongest political power as the prime minister “above” the president. In this situation, the newly created ‘investigative committee’ has also, as expected, filled in for the previous political role of the prosecution service even in part, along with its chairman, Aleksander Bastrykin’s strong loyalty to Putin. As noted before, nevertheless, this new power agency had repeatedly come to conflict with the prosecution service led by Prosecutors General Yurii Chaika. In spring 2011, for instance, the ‘investigative committee’ launched criminal investigations of some high-ranking prosecutors, working in the Moscow City and Oblast Prosecutors’ Offices, on the charge of secretly protecting a massive size of underground illegal gambling business. In particular, Chaika’s son, Artyom Chaika, was also included in the suspected prosecutors (*Rossiiskaya Gazeta* 15 February 2011¹; *The Moscow Times* 30 March 2011). As this implied that such a conflict between the two power agencies can be institutionalised to a mechanism of “checks and balances” between them, the fairness of Russian criminal justice system will also be improved in long-term perspective, though this mechanism may not be so effective at present as Putin is still controlling both the power organs after restarting one more presidential term in December 2012. Above all, whenever Putin totally retires from political arena by any reason and hence his semi-authoritarian regime ends, at least the prosecution service possessing an extremely centralised power available for a dangerous political weapon will not exist. In other words, Russia will be able to have a much higher chance of the democratic consolidation when democratisation returns to this country, compared to the time when the Soviet Union collapsed and Russia embraced its first democratisation in early 1990s.

In conclusion, if an emerging democratic country adopts presidentialism without careful consideration of whether their prosecution system is closer to the common-law or civil-law tradition, the hasty choice would bring a serious danger of the politicisation of criminal justice. Hence, a subtle balance between the rule of law and democracy, around criminal proceedings, could be upset, and correspondingly the consolidation of democracy might be

¹ This report was translated by the *Current Digest of the Russian Press* vol. 63, no. 7 (2011): 10-11.

delayed indefinitely. As several new democratic countries already made this big mistake, prosecutors have taken a partisan behaviour, in favour of or against incumbent presidents, along with presidential electoral cycles, and consequently the presidents have repeatedly swung between an imperial and 'lame duck' ruler, in these countries. More importantly, if the institutional combination of presidentialism and a civil-law prosecution system is once formed, the peril of the politicisation of prosecutors cannot easily be corrected. Ironically and unfortunately, as long as a semi-authoritarian regime would not be built and therefore political competition would not be eliminated, any large-scale reform against the civil-law prosecution service may not be achieved in the new democracies.

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